EARLDOM OF ANNANDALE AND HARTFELL

REPORT FROM THE COMMITTEE FOR PRIVILEGES TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE AND THE SPEECHES OF COUNSEL

Ordered by The House of Lords *to be printed*
23*rd July* 1985

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CONTENTS

ORDERS OF REFERENCE, ETC.

DIE LUNÆ, 3° DECEMBRIS 1984

Earl of Annandale and Hartfell—The Petition of Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk, Chief of the Name and Arms of Johnstone, to Her Majesty praying that Her Majesty will be graciously pleased to admit his succession to, and declare him entitled to, the title, honour and dignity of Earl of Annandale and Hartfell in the peerage of Scotland, and to direct that a Writ of Summons to Parliment be issued to him by the name and style of Earl of Annandale and Hartfell, together with Her Majesty's reference thereof to this House, and the report of the Lord Advocate thereon, was presented (by command) and referred to the Committee for Privileges to report thereon.

DIE MERCURII, 16° JANUARII 1985

Earldom of Annandale and Hartfell—The petition of the petitioner that the time for lodging his Case, Pedigree and Proofs may be extended to 25th of February next (notwithstanding the provisions of Standing Order 74(I)) was presented ; and it was ordered as prayed.

DIE MERCURII, 23° JANUARII 1985

Earldom of Annandale and Hartfell—The petition of Patrick Andrew Wentworth Hope Johnstone praying for leave to dispense with proof of certain documents and to dispense with translation of Latin documents, was presented and referred to the Committee for Privileges.

Earldom of Annandale and Hartfell—The petition of Patrick Andrew Wentworth Hope Johnstone praying for leave to dispense with formal proof of heirship, was presented and referred to the Committee for Privileges.

DIE LUNÆ, 10° JUNII 1985

Committee for Privileges—It was moved by the Chairman of Committees That the Lord Keith of Kinkel be appointed Chairman of the Committee for the consideration of the Petition in the Annandale Peerage case ; the motion was agreed to.

DIE MARTIS, 23° JULII 1985

Earldom of Annandale and Hartfell—The Report from the Committee for Privileges was made and ordered to be printed (No. 228).

PETITION TO THE QUEEN'S MOST EXCELLENT MAJESTY

The Humble Petition

of

PATRICK ANDREW WENTWORTH HOPE JOHNSTONE OF ANNANDALE AND OF THAT ILK, Chief of the Name and Arms of Johnstone

SHEWETH:—

Article 1.

That His Majesty King Charles the Second, by Warrant (or Signature) under his Sign Manual which bears date at Whitehall 23rd April 1662, with the advice of the Lords and Commissioners of His Majesty's Exchequer in Scotland, ordained that a Charter be expede under the Great Seal of Scotland granting to James Earl of Annandale and Hartfell, Viscount of Annan, Lord Johnstone of Lockwood, Lochmaben, Moffatdale, and Evandale (2) " and the heirs male lawfully gotten or to be gotten of his body whilks failzeing to his heirs female without division already procreat or to be procreat of the body of the said James earl of Annandaill and the heirs male lawfully to be procreat of the body of the said eldest heir female careing the name and arms of Johnstoun which they shall be holdin ever to assume and carry in all tyme comeing whilks failzeing the said James earl of Annadaill his nearest and lawfull heirs and assignayes what sumever " the lands, lordships, baronies and others therein enumerated.

Article 2.

That the said Warrant contained a *novodamus* to James Earl of Annandale and Hartfell (2), and the series of heirs therein specified, of the lands, lordships, baronies, and other therein enumerated; and erected the whole into a free barony, lordship and earldom, to be called the Earldom of Annandale and Hartfell, and Lordship of Johnstone, " with the title styll and dignitie of ane earl according to the date of the said James earl of Annandaill and Hartfell and his said deceast father their patents granted to them thereupon."

Article 3.

That there was annexed to the said Warrant a Docquet subscribed by John Earl of Lauderdale, Secretary of State. The said Docquet set forth that the said Warrant contained a gift by His Majesty to James Earl of Annandale and Hartfell (2) " and to his heirs and assignes of the lands lordships tenendries and others particularly therein contained . . . . united in a free barony lop and earledome . . . . to be called the earldome of Annandale and Hartfell and lordship of Johnstoun with the dignity of ane earle acording to the date of James earle of Annandaill and Hartfell and his deceased father their patents."

Article 4.

That the said Warrant was superscribed by His Majesty King Charles the Second. The said Warrant was subscribed by Sir John Gilmour of

Craigmiller, Lord President of the Court of Session, Sir John Fletcher of New Cranstoun, Lord Advocate, Sir George Lockhart of Carnworth, afterwards Lord President of the Court of Session, and others who *ex officio* revised and adjusted the said Warrant.

Article 5.

That in virtue of the said Warrant, and in strict conformity with the terms thereof, a Charter passed the Great Seal of Scotland 23rd April 1662, in favour of James Earl of Annandale and Hartfell (2), and the series of heirs specified in the said Warrant, of the territorial Earldom of Annandale and Hartfell, and Lordship of Johnstone "cum titulo stylo et dignitate comitis secundum datas diplomatum dict, consanguineo et consiliario nostro Jacobo comiti de Annandaill et Hartfell et quondam ejus patri desuper concess."

Article 6.

That, by an Act of Parliament of Scotland, which was made at Edinburgh on 23rd December 1669, His Majesty King Charles the Second, with the advice and consent of the Estates of Parliament, ratified and approved the said Charter in favour of James Earl of Annandale and Hartfell (2), and the series of heirs therein specified, of the territorial Earldom of Annandale and Hartfell, and Lordship of Johnstone, "with the tytle styll and dignity of earle thereof."

Article 7.

That James Johnstone of that Ilk (1) was, by His Majesty King Charles the First, created a Lord of the Parliament of Scotland, with the title Lord Johnstone of Lochwood: The Patent of creation bears date at Holyroodhouse 20th June 1633: The limitation of the peerage dignity was to the patentee and his heirs male forever.

Article 8.

That James Lord Johnstone of Lockwood (1) was, by His Majesty King Charles the First, created Earl of Hartfell, Lord Johnstone of Lochwood, Moffatdale and Evandale: The Patent of creation bears date at Oxford 18th March 1643: The limitation of the peerage dignity was to the patentee and his heirs male forever.

Article 9.

That James Earl of Hartfell (1) died April 1653, and was succeeded in his titles and dignities by his elder son, James second Earl of Hartfell (2) who was, by His Majesty King Charles the Second, created Earl of Annandale and Hartfell, Viscount of Annan, Lord Johnstone of Lochwood, Lochmaben, Moffatdale, and Evandale, with the precedence of his father: The Patent of creation bears date at Whitehall 13th February 1661: The limitation of the peerage dignity was to the patentee and his heirs male; whom failing the eldest heir female without division of the body of the patentee hitherto begotten or to be begotten, and the heirs male of the body of the said eldest heir female lawfully to be begotten bearing the name and arms of Johnstone; whom all failing the nearest heirs whomsoever of the patentee.

Article 10.

That James Lord Johnstone, afterwards Earl of Annandale and Hartfell (2) married (1645) Lady Henrietta Douglas, daughter of William Marquis of Douglas, and by her had issue, four sons and seven daughters: James Earl of Annandale and Hartfell (2) died 17th July 1672.

Article 11.

That the eldest son of James Earl of Annandale and Hartfell (2) by his said marriage was James Johnstone (3), who was born 17th December 1660 and died *vita patris.*

Article 12.

That the second, but eldest surviving son of James Earl of Annandale and Hartfell (2) by his said marriage was William first Marquis of Annandale (4) (so created by Patent 24th June 1701, with a limitation to the heirs male whomsoever of the patentee succeding him in his lands and estate in all time coming), who was born 17th February 1664 and succeeded his father in his titles and dignities and as heir of provision under the entail of the Charter 1662.

Article 13.

That William first Marquis of Annandale (4) married first (1682) Sophia, daughter of John Fairholm of Craigiehall, and by her had issue, three sons and two daughters.

Article 14.

That the eldest son of William first Marquis of Annandale (4), by his said first marriage, was James Lord Johnstone, afterwards second Marquis of Annandale (5), who was born before 1688 and, upon his father's death (*vide* Article 17), succeeded him in his titles and dignities, and in the character of heir of provision under the entail of the Charter 1662, and who died without issue about 1730.

Article 15.

That the second son of William first Marquis of Annandale (4), by his said first marriage, was John Johnstone (6), who was born 3rd August 1688 and died about 1694.

Article 16.

That the third son of William first Marquis of Annandale (4), by his said first marriage, was Lord William Johnstone (7), who was born August 1696 and died without issue 24th December 1721.

Article 17.

That Sophia Marchioness of Annandale died 13th December 1716, and William first Marquis of Annandale (4) married secondly (1718) Charlotta Van Lore, daughter of John Vanden Bempde, and by her had issue, two sons: William first Marquis of Annandale (4) died 14th January 1721.

Article 18.

That the elder son of William first Marquis of Annandale (4), by his said second marriage, was Lord George Vanden Bempde Johnstone, afterwards third Marquis of Annandale (8), who was born 29th May 1720, and, upon the death of his brother consanguinean, James second Marquis of Annandale (5), succeeded him in his titles and dignities, and succeeded his father as heir of provision under the entail of the Charter 1662, and who died without issue 29th April 1792, when his title and dignities became *dormant*.

Article 19.

That the younger son of William first Marquis of Annandale (4), by his said second marriage, was Lord John Johnstone (9), who was born posthumously 8th June 1721 and died without issue October 1742.

Article 20.

That the third son of James Earl of Annandale and Hartfell (2), by his said marriage, was John Johnstone (10), who was born 3rd September 1665, and married (1713) Catherina Christina daughter of Count Detler Zievert von Ahlefeldt, by whom he had issue, a daughter: John Johnstone (10) had a Charter of the lands of Stapleton 23rd September 1702, the grant being to himself " et haeredibus de ejus corpore " whom failing to his brother William first Marquis of Annandale (4) " et haeredibus suis et successoribus ad terras comitatum et statum de Annandale succeden ", and died 1713, the said lands of Stapleton reverting thereafter to William first Marquis of Annandale (4) and his heirs and successors etc. in terms of the said grant.

Article 21.

That the fourth son of James Earl of Annandale and Hartfell (2), by his said marriage, was George Johnstone (11), who was born 21st June 1667 and died 10th May 1674.

Article 22.

That the elder daughter of William first Marquis of Annandale (4), by his said first marriage, was Lady Henrietta Johnstone (13), who was born 11th November 1682, and married (1699) Charles Hope of Hopetoun, created Earl of Hopetoun, of this marriage there being issue, four sons and eight daughters: Lady Henrietta Johnstone, Countess of Hopetoun (13) died 25th November 1750.

Article 23.

That the eldest son of Lady Henrietta Johnstone, Countess of Hopetown-(13), by her said marriage, was John second Earl of Hopetoun (14), who was born 7th September 1704, married first (1733) Lady Ann Ogilvie, daughter of James Earl of Findlater and Seafield, and by her had issue, five sons and four daughters: John second Earl of Hopetoun (14) died 12th February 1781.

Article 24.

That the eldest son of John second Earl of Hopetoun (14), by his said first marriage, was Charles Lord Hope (15), who was born 9th July 1740 and died 6th June 1766 *vita patris*.

Article 25.

That the second, but only surviving, son of John second Earl of Hopetoun (14), by his said first marriage, was James third Earl of Hopetoun (16), who was born 21st August 1741, married (1766) Lady Elizabeth Carnegie, daughter of George Earl of Northesk, and by her had issue, six daughters: James third Earl of Hopetoun (16), succeeded him as heir of provision under the entail of the Charter 1662, having in addition to the name of Hope assumed the name Johnstone, and was advised of his right to claim the Annandale peerages, *inter alia* the peerage dignity created by Charter 1662: James third Earl of Hopetoun (16) died 29th May 1816.

Article 26.

That the eldest daughter of James third Earl of Hopetoun (16), by his said marriage, was Lady Ann Hope Johnstone (17), who was born 13th January 1768, and married (1792) her cousin Admiral Sir William Johnstone Hope, of this marriage there being issue, four sons and two daughters: Lady Ann Hope Johnstone (17), who succeeded her father in the character of heir of provision under the entail of the Charter 1662, died 28th August 1818.

Article 27.

That the aldest son of Lady Ann Hope Johnstone (17), by her said marriage, was John James Hope Johnstone *primus* (18), who was born 29th November 1796, married (1816) Alicia Anne, daughter of Colonel George Gordon of Hallhead, and by her had issue, seven sons and three daughters: John James Hope Johnstone *primus* (18), who succeeded his mother in the character of heir of provision under the entail of the Charter 1662, died 11th July 1876.

Article 28.

That the eldest son of John James Hope Johnstone *primus* (18), by his said marriage, was William James Hope Johnstone (19), who was born 1st July 1819, married (1841) the Hon. Octavia Sophia Bosville Macdonald, daughter of Godfrey Baron Macdonald, and by her had issue, three sons and one daughter: William James Hope Johnstone (19) died 17th March 1850 *vita patris*.

Article 29.

That the eldest son of William James Hope Johnstone (19), by his said marriage, was John James Hope Johnstone *secundus* (20), who was born 5th October 1842, succeeded his grandfather, John James Hope Johnstone *primus* (18), in the character of heir of provision under the entail of the Charter 1662, and died without issue 26th December 1912.

Article 30.

That the second son of William James Hope Johnstone (19), by his said marriage, was Percy Alexander John Hope Johnstone (21), who was born 13th August 1845, married (1878) his cousin Evelyn Ann, daughter of Captain George Gordon Hope Johnstone, and by her had issue, one son and two daughters: Percy Alexander John Hope Johnstone (21) died 7th August 1899.

Article 31.

That the only son of Percy Alexander John Hope Johnstone (21), by his said marriage, was Evelyn Wentworth Hope Johnstone (22), who was born 9th May 1879, married first (1905) Eileen, daughter of Gustavus Villiers Briscoe of Bellinter, and by her had issue, a son: Evelyn Wentworth Hope Johnstone (22), who succeeded his uncle, John James Hope Johnstone *secundus* (20), in the character of heir of provision under the entail of the Charter 1662, died 26th October 1964.

Article 32.

That Major Percy Wentworth Hope Johnstone of Annandale and of that Ilk, who having been recognised by the Lord Lyon King of Arms as Chief of the Name and Arms of Johnstone, matriculated Arms in the Public Register of All Arms and Bearings in Scotland (Volume 66, Folio 71) on 4th February 1983, was born 2nd January 1909 the son of Evelyn Wentworth Hope Johnstone and succeeded his father as heir of provision under the entail of the Charter 1662; and having presented a Petition to the Queen's Most Excellent Majesty on 29th March 1982, claiming the style and dignity of Earl of Annandale and Hartfell, in the Peerage of Scotland, died on 5th April 1983.

Article 33.

That the Claimant, born on 19th April 1941, is the only son and heir of Major Percy Wentworth Hope Johnstone of Annandale and of that Ilk, and succeeded his father as heir of provision under the entail of the Charter of 1662 and as Chief of the Name and Arms of Johnstone: the Claimant has been advised accordingly that he has a right to the title, style and dignity of Earl of Annandale and Hartfell in the Peerage of Scotland and is desirous of continuing the claim presented to the Queen's Most Excellent Majesty by his late father the said Major Percy Wentworth Hope Johnstone of Annandale and of that Ilk.

Article 34.

The claimant reserves his right to establish his claim to the peerage dignities granted by the Patent of 1661 upon proof of the extinction of heirs male of the first Earl of Annandale and Hartfell.

Your Majesty's Petitioner, the said Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk therefore humbly beseeches your Majesty that you will be graciously pleased to admit his succession to, and declare him entitled to, the title, style and dignity of Earl of Annandale and Hartfell in the Peerage of Scotland, and that your Majesty will be graciously pleased to direct that a Writ of Summons shall be issued to your said Petitioner by the title and style of Earl of Annandale and Hartfell. And your said Petitioner will ever humbly pray.

P. A. W. HOPE JOHNSTONE OF ANNANDALE AND OF THAT ILK

REPORT BY HER MAJESTY'S LORD ADVOCATE

TO THE QUEEN'S MOST EXCELLENT MAJESTY

1. In humble obedience to Your Majesty's Commands, signified to me by the Right Honourable George Younger, Your Majesty's Secretary of State for Scotland, referring for consideration the Petition of Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk, Chief of the Name and Arms of Johnstone claiming to be Earl of Annandale and Hartfell in the Peerage of Scotland and praying that Your Majesty will be graciously pleased to acknowledge his right thereto, I humbly beg leave to certify that I have taken the said Petition into my consideration and that prints of the documents hereinafter referred to have been produced before me among others in support of the allegations of the said Petition.

2. The Petitioner claims—

(1) that the Charter (2) in favour of James Earl of Annandale and Hartfell (designated " (2) " in the Petition and first referred to therein in Article One thereof) (which dignity and others had been granted to him by His Majesty King Charles the Second by Patent (5) bearing the date at Whitehall 13th February, 1661) which passed the Great Seal of Scotland on 23rd April, 1662 operated as a new grant of a peerage dignity to James Earl of Annandale and Hartfell (2) and the series of heirs therein specified, namely the heirs male of his body, whom failing the heirs female of his body without division and the heirs male of the body of the eldest heir female bearing the name and arms of Johnstone whom failing, the nearest lawful heirs of James the said Earl ;

(2) that there are accordingly two Annandale Peerages which bear the same title of honour, namely the Earldom of Annandale and Hartfell but with separate and different limitations ;

(3) that notwithstanding that others, through whom the Petitioner is descended, have failed to satisfy the Committee for Privileges and the House of Lords that their claims to *inter alia* the peerage dignity of the Earldom of Annandale and Hartfell had been made out, the present claim is not barred *res judicata,* in respect that none of the previous claims was founded upon the Charter 1662 (2) but upon the Patent 1661 (5) ; Accordingly, the Petition submits that the Resolutions of the Committee for Privileges dated 11th June, 1844 and 30th May, 1879, and the Orders of the House of Lords following thereon are no bar to the present claim ;

(4) that the Petitioner is now entitled to succeed in the character of heir of provision under the entail contained in the Charter 1662 to the said dignity.

3. In view of the above, I have to inform Your Majesty that the construction of the Charter 1662 (2) and the sufficiency of the evidence produced by the Petition to prove his claim are matters governed by the law of Scotland.

4. No other person at present asserts the right to the said dignities, and, accordingly, I have made a detailed examination of the claim made by the Petitioner.

5. In order to place the consideration of the Petitioner's claim and the evidence to be adduced in support thereof in context, it is necessary briefly to narrate the history of the various claims to the Annandale peerages made between 1792 and 1881:—

(1) In 1795, James, Third Earl of Hopetoun (designated "(16)" in the Petition and first referred to therein in Article twenty five thereof), who, according to the Petitioner, was a grandson of the eldest granddaughter of James, Earl of Annandale and Hartfell (2) presented a Petition claiming *inter alia* the titles Earl of Annandale and Hartfell. The Petition was referred to the Committee for Privileges but no further procedure followed thereon.

(2) In 1816, Lady Anne Hope Johnstone (designated "(17)" in the Petition and first referred to therein in Article twenty six thereof), who, according to the Petitioner, was the eldest daughter of James, Third Earl of Hopetoun (16) presented a Petition claiming *inter alia* the said Titles to the Earldom of Annandale and Hartfell. However, she died in 1818, when he claim was still in dependence.

(3) In 1820, John James Hope Johnstone *primus* (designated "(18)" in the Petition and first referred to therein in Article twenty seven thereof), who, according to the Petitioner, was the eldest son of Lady Anne Hope Johnstone (17), likewise presented a Petition claiming *inter alia* the said Titles. After sundry procedure, the Committee for Privileges, on 25th May 1826, resolved, in effect, that the then Petitioner should advertise for rival claimants. Thereafter, numerous meetings of the Committee for Privileges took place. At one such meeting, on 15th May 1834, Lord Brougham indicated by way of "preliminary opinion" that in his view the claim of John James Hope Johnstone *primus* (18) had been made out. However, notwithstanding his Lordship's "preliminary opinion", the Committee, on 11th June, 1844, resolved, *inter alia,* that John James Hope Johnstone *primus* (18) had not made out his claim.

(4) Further Petitions were presented on behalf of John James Hope Johnstone *primus* (18) in 1844 and 1876. The contentions in the claim in the latter Petition were based primarily upon a Bond of Tailzie and Resignation executed by James, then Second Earl of Hartfell (2) on 14th May, 1657, which document was not apparently discovered until January, 1876. John James Hope Johnstone *primus* (18) died in 1876 shortly after the presentation of the latter Petition. The claim contained therein was taken up by John James Hope Johnstone *secundus* (designated "(20)" in the Petition and first referred to therein in Article twenty nine thereof), who, according to the Petitioner, was the grandson of John James Hope Johnstone *primus* (18), and subsequently, in 1877, by his *curator bonis* when John James Hope Johnstone *secundus* (20) became incapable of managing his own affairs.

It is understood that the significance of the discovery of that document was that its terms allegedly added weight to the construction of the limitation, contained in the Patent (5) granted by Charles II in 1661, contended for by the then claimant ; the then claimant and his forebears contended that the first limitation in the Patent 1661 (5), namely to the Patentee's heirs male, should be construed as the heirs male of his body ; by virtue of the Bond, James, then second Earl of Hartfell (2) purported to resign into the hands of the Commissioners of Exchequer his lands and titles of honour for regrant to himself with destinations first to the heirs male of his body. The legality of the Bond, having been executed during the period of Cromwell's Commonwealth and Protectorate, was, however, challenged. Accordingly, on 30th May 1879, the Committee for Privileges declared that it was not prepared to depart from the resolution of 11th June, 1844, and so resolved.

(5) Each and all of the Petitions presented on behalf of John James Hope Johnstone *primus* (18) and John James Hope Johnstone *secundus* (20) proceeded upon what was claimed to be the proper construction to be placed upon the limitations contained in the Patent 1661 (5), referred to above (paragraph 2 (1)). None was founded upon the Charter 1662. I understand that certain advice was given in relation to the possibility of basing a claim upon the Charter 1662. However, it appears that that advice was not acted upon. I do not propose to speculate upon the reasons therefor, but should Your Majesty be graciously pleased to refer the present Petition for the consideration of the House of Lords, their Lordships will no doubt wish to have this aspect of the case further clarified. However, for present purposes, I do not consider that any failure on the part of the Petitioner's forebears to base their claims upon the Charter 1662 affects to any material extent my assessment of the merits of the present claim.

(6) During the period between 1792 and 1881 various other claimants presented Petitions laying claim to the titles to the Annandale Peerages. None satisfied the Committee for Privileges that their claim had been made out. Those claimants bear to have been remoter descendants of other of the Johnstone family.

(7) Many of the documents now produced in support of the present Petitioner's claim have accordingly already been the subject of careful scrutiny not only by the Committee for Privileges but also by the Law Officers of the Crown in the above-mentioned proceedings. Those documents are printed in the printed Minutes of Evidence before the Committee for Privileges in relation to the Annandale Peerage claims, and I am satisfied as to their authenticity. I have accordingly, and for other reasons stated below, not thought it necessary to examine the original documents or the copies produced to the Committee of those documents which are printed in the said Minutes. Accordingly, references herein to documents are, unless otherwise stated, references to such documents as printed in the said Minutes of Evidence.

6. In order to prove the creation of the dignity Earl of Annandale and Hartfell in the Peerage of Scotland by Charter under the Great Seal 23rd April 1662, there were produced to me Warrant (or Signature) under the Sign Manual of His Majesty King Charles the Second (1) dated 23rd April 1662, with Docquet annexed thereto, Charter (2) under the Great Seal in favour of James, Earl of Annandale and Hartfell (2) dated 23rd April 1662, and Act of Ratification by the Parliament of Scotland (3) dated 23rd December 1669. There were also produced Letters patent (4) dated 18th March 1643, creating James Lord Johnstone of Lochwood (designated "(1)" in the Petition and first referred to therein in Article seven thereof) Earl of Hartfell in the Peerage of Scotland dated 18th March 1643, and Letters patent dated 13th February 1661, (5) creating the said James, Second Earl of Hartfell (2) *inter alia* Earl of Annandale and Hartfell in the Peerage of Scotland. In addition, there was also produced what bears to be a draft of the said Warrant.

7. (1) In order to prove

(*a*) the extinction of the heirs male of the body of James Earl of Annandale and Hartfell (2),

(*b*) that upon the extinction of the heirs male of the body of James Earl of Annandale and Hartfell (2) the succession opened in 1792 to the heir female of the body of James Earl of Annandale and Hartfell (2),

(*c*) that in 1816, the succession again opened to the heir female of the body of James Earl of Annandale and Hartfell (2), and

(*d*) that the Petitioner is the heir male of the body of that heir female,

there were produced to me a family pedigree and full documentary evidence in support thereof which is summarised in the draft Abstract of Evidence which accompanies the Petitioner's draft Case. With the exception of the following sixteen documents, namely:—

(1) Historische genealogische und diplomatische Nachricht von dem uralten, adelischen Geschlecht derer von Ahlefeldt by Moller (Flensburgh 1771) (22);

(2) Despatches of James Scott, British Minister at Warsaw, (2). 9th January, 1715—Public Record Office London S.P. 88/22;

(3) Extract Decree of Special Service (35) of John James Hope Johnstone *secundus* (20) as heir of tailzie and provision of John James Hope Johnstone *primus* (18), his graandfather, dated 31st October and recorded in Chancery, 1st November, and recorded G.R.S. Dumfries and Lanark 6th December, 1876;

(4) Extract Decree of Special and General Service (36) of Evelyn Wentworth Hope Johnstone (designated "(22)" in the Petition and first referred to therein in Article thirty one thereof who, according to the Petitioner was the nephew of John James Hope Johnstone *secundus* (20)), as heir of tailzie and provision of John James Hope Johnstone *secundus* (20), his uncle, dated 13th and recorded in Chancery, 19th February, and recorded G.R.S. Dumfries 5th April, 1913;

(5) Certificate of Marriage (37) of Evelyn Wentworth Hope Johnstone (22) and Eileen, daughter of Gustavus Villiers Briscoe of Bellinter, Co. Neath ;

(6) Certificate of Birth (38) of Major Percy Wentworth Hope Johnstone of Annandale and of that Ilk, designated (23) in the Petition and first referred to therein in Article thirty two thereof, who, according to the Petitioner was the father of the Petitioner ;

(7) Certificate of Death (45) of the said Major Percy Wentworth Hope Johnstone of Annandale and of that Ilk (23) ;

(8) Certificate of Marriage (40) of Percy Wentworth Hope Johnstone (23) and Phyllis Athena, daughter of Edgar Napier Macdonnell ;

(9) Certified Copy Interlocutor (41) *in causa* Phyllis Athena Macdonnell or Hope Johnstone v Percy Wentworth Hope Johnstone (23) dated 21st July 1939 ;

(10) Certificate of Marriage (42) of Percy Wentworth Hope Johnstone (23) and Margaret, daughter of Herbert William Francis Hunter-Arundell of Barjarg ;

(11) Certificate of Birth (43) of the Petitioner ;

(12) Extract (44) of the Matriculation of Arms of Percy Wentworth Hope Johnstone of Annandale and of that Ilk (23) matriculated in the Public Register of All Arms and Bearings in Scotland (Volume 66 Folio 71) on 4th February 1983 ;

(13) Letter (46) from the Lord Lyon King of Arms to Messrs J. C. & A. Steuart WS, Edinburgh ;

(14) Certificate of Death (39) of Evelyn Wentworth Hope Johnstone (22) ;

(15) Certified Copy Interlocutor dated 8th February 1984 pronounced by the Lord Lyon King of Arms in relation to a Petition presented by the present Petitioner to the Court of the Lord Lyon in Scotland concerning his lineage, genealogy and gentle status amongst the Nobles of this Realm ;

(16) Extract of Certificate granted by the Lord Lyon King of Arms on 2nd March 1984 and recorded with the genealogy of the Petitioner therein specified in the Public Register of All Genealogies and Birthbrieves in Scotland (Volume IV Folio 65) ;

all the documents were produced before, considered and scrutinized by the Committee for Privileges in the previous proceedings referred to above. I have examined those documents together with the said sixteen documents and am satisfied as to the authenticity of all those documents. I have also examined the document which bears to be a draft of the Warrant referred to in paragraph 6 above. I can reach no view as to the authenticity or significance of that document. I consider that a careful examination will have to be made of any evidence relating to its preparation and discovery and of the reasons why it has not featured in earlier proceedings. However, my reservations in relation to that document do not affect to any material extent my assessment of the merits of the Petitioner's claim.

7. (2) I consider, however, that there are several reasons why Your Majesty may think fit not to insist that the Petitioner should formally prove his heirship by the production and detailed examination of the foregoing documents. In the first place, all but the said sixteen documents and the said document which bears to be a draft Warrant had been received in evidence by the Committee for Privileges in previous proceedings relating to the Annandale peerages. In relation to the claim of John James Hope Johnstone *primus* (18) the Committee for Privileges appeared to have been satisfied that he had proved his pedigree (Minutes 15th May, 1834, page 87 bottom, "Preliminary Opinion" of Lord Brougham of even date therewith at *page* 5½). Although there were certain inaccuracies in the evidence in relation to John Johnstone of Stapleton (designated "(10)" in the Petition and first referred to therein in Article twenty thereof, who, according to the Petitioner was the third son of James, Earl of Annandale and Hartfell (2)), I have had the advantage of examining a detailed Report prepared by Debrett Ancestry Research Limited, which your Majesty may reasonably consider establishes that the said John Johnstone of Stapleton (10) probably died in Poland in or about December, 1714 leaving issue, namely an only daughter who died in infancy in 1715.

7. (3) In the second place, by Interlocutor dated 14th October 1982, in relation to a Petition presented by the present Petitioner's father, the said Major Percy Wentworth Hope Johnstone of Annandale, the Lord Lyon King of Arms found *inter alia* that the Petitioner's father was in right of the Ensigns Armorial of Johnstone of Annandale and of that Ilk, and that he was entitled to matriculation in the Public Register of All Arms and Bearings in Scotland of the Ensigns Armorial specified in the said Interlocutor. I have examined a true copy of the foregoing Interlocutor. Further, the Lyon Clerk, on 4th February 1983, matriculated the said Ensigns Armorial in the name of the Petitioner's father in the said Register (volume 66, folio 71). I have examined a true copy of an Extract of the matriculation of the said Arms (44) dated 16th February 1983. In addition, in a Petition presented by the present Petitioner to the Court of the Lord Lyon King of Arms, the Lord Lyon, by Interlocutor dated 8th February 1984, found, after proof:

(*a*) that on the death of George, third Marquis of Annandale (designated "(8)" in the Petition to Your Majesty and first referred to therein in Article eighteen thereof, and who, according to the Petitioner was the elder son of William First Marquis of Annandale by his second marriage; the said William, First Marquis of Annandale is designated "(4)" in the Petition, is first referred to therein in Article twelve thereof, and, according to the Petitioner was the second but eldest surviving son of James Second Earl of Hartfell (2)) in 1792, the heirs male of the body of James, First Earl of Annandale and Hartfell (2) became extinct;

(*b*) that on the death of the said George, third Marquis of Annandale (8), James, Third Earl of Hopetoun (16), succeeded in terms of the Charter of 3rd April 1662 *inter alia* to the representation of the Family of Johnstone of Annandale as heir female of the body of the said James, First Earl of Annandale and Hartfell (2);

(*c*) that on the death of the said James, Third Earl of Hopetoun (16) in 1816, Lady Anne Hope Johnstone (17) of Annandale succeeded in

terms of the said Charter of 1662 (2) *inter alia* to the foresaid representation of the Family of Johnstone of Annandale as the then heir female of the body of the said James, First Earl of Annandale and Hartfell (2) ; and

(*d*) that the Petitioner in terms of the said Charter of 1662 (2), as the heir male of the body of the said Lady Ane Hope Johnstone of Annandale (17), succeeded *inter alia* to the foresaid representation of the Family of Johnstone of Annandale.

Your Majesty may accordingly consider that, as the Lord Lyon's said Interlocutor is acceptable as evidence (*Oxfuird Peerage Claim* per Lord Fraser of Tullybelton dated 24th March 1977 at page 109 ; *Innes of Learney, Scots Heraldry page 196*), the Petitioner's pedigree as recorded in the Public Register of All Genealogies and Birthbrieves in Scotland (volume iv folio 65), correctly sets out the members of his family and the connection between the Petitioner and James First Earl of Annandale and Hartfell (2).

7. (4) In these circumstances, Your Majesty may think it unnecessary to put the Petitioner to formal proof of his heirship aforesaid.

8. (1) Accordingly, I consider that the principal issue which will fall to be determined is whether the Charter 1662 (2) created the peerage dignity which the Petitioner contends it did. Having examined the Minutes of Evidence, the Cases for several of the claims, Speeches of Counsel and the Speeches of the Noble Lords who sat as members of the Committee for Privileges in relation to the previous proceedings outlined above, it is clear that that question was never an issue to which lengthy and detailed consideration was given. Although the Charter 1662 was put in evidence, and although various statements were made in relation to it (e.g. the speech of Mr Fleming, Counsel for Sir Frederick Johnstone, a rival claimant of John James Hope Johnstone *secundus* (22), on 29th May, 1879, pages 41 and 42 of Speeches and Judgments ; additional case on behalf of Sir Frederick John William Johnstone (son of the said Sir Frederick Johnstone) at pages 15, 16 and 17, and Appendix thereto at pages 43 and 44 ; case for John James Hope Johnstone 1876 pages 30-32), it is to be noted that the Charter 1662 was not referred to either in the Speeches of their Lordships delivered on 11th June, 1844 or in their Speeches delivered on 30th May 1879. As I have already observed, none of the previous claims was founded upon the alleged grant of a peerage dignity by the Charter 1662.

8. (2) In the first head (ii) of the Petitioner's draft case, he contends that the Charter falls to be construed in the light of contemporary Charters carrying the grant of a territorial earldom. The precise effect of the words " cum titulo stylo et dignitate comitus secundum datas diplomatum dict. consangiuineo et consiliario nostro Jacobo comiti de Annandaill et Hartfell, et quondam Ejus patri desuper concess ", having regard to their position in the Charter 1662, and the existing patent 1661 as well as the terminology of contemporary Charters will all require careful scrutiny. In particular, in previous proceedings some consideration was given to the words of creation being neither in the

dispositive clause nor in the quaequidem clauses of the Charter (see additional case on behalf of Sir Frederick John William Johnstone pages 15, 16 and 17, Appendix page 44, and case for John James Hope Johnstone pages 30-31). The expert evidence of a scholar specialising in the interpretation of such documents will require careful analysis. My enquiries as to the nature, import and effect of certain contemporary Charters suggest that the Charter 1662 (2) may have created and granted the new peerage dignity contended for by the Petitioner. While my enquiries have revealed that it is uncommon to have two peerages of the same name but with different destinations in the Peerage of Scotland, it is not impossible for this to occur; for example, there are two dignities known as the Earldom of Mar; each has a different destination. A number of other examples have been cited to me to support the proposition that two Annandale Peerages bearing the same titles of honour, namely the Earldom of Annandale and Hartfell but with separate and different limitations may competently and do exist. However, in none of these does the grant of the second dignity follow so closely upon the first as the Charter 1662 (2) follows the Patent 1661 (5). However, there may have been good reasons why this occurred. I understand that the Petitioner proposes to establish that, as the marriage of James, then Earle of Hartfell (2), to Lady Henrietta Douglas had until 1660 produced only daughter and in that year a son was born who probably died in infancy, James, then Earl of Hartfell (2), was deeply concerned to keep his lands, titles and honours within his immediate family rather than allowing them to devolve upon a remoter kinsman who would, for example, have succeeded to the dignities conferred by the Patents of 1633 and 1643 the limitations in each of which were to the heirs male of the Patentee.

8. (3) Accordingly, at this stage, I consider that there is a *prima facie* case for contending that the Charter 1662 was habile to confer and did confer the dignity Earl of Annandale and Hartfell.

9. (1) In the fifth head of the Petitioner's draft case, the claimant contends that the resolutions of the Committee for Privileges dated 11th June, 1844 and 30h May, 1879 are no bar to the presentation of his claim and that his claim is thus not barred *res judicata.*

9. (2) The question of *res judicata* has arisen in relation to previous claims to the Annandale peerages. However, having regard particularly to (a) the fact that no previous claim was founded specifically upon the Charter 1662, (b) the general inapplicability of the doctrine of *res judicata* to rights of blood, and (c) the Statement of the Earl of Redesdale on 30th May, 1879 to the effect that the resolution of the Committee of that date would not bar "any further proceedings which any claimant may be disposed to take by any subsequent steps", I consider that the submissions that the present claim is not *res judicata* is well founded.

9. (3) Upon the whole, after a detailed examination of the evidence produced to me, it appears to me that the Petitioner has established *a prima facie* case.

10. Moreover, Your Majesty's Petitioner claims by right, and, upon consideration of the premises, I humbly beg to *Report*

THAT in my opinion, there are sufficient grounds to justify the reference of the present Petition for the consideration of the House of Lords and that it is advisable that Your Majesty should so refer it if Your Majesty shall be graciously pleased so to do.

ALL WHICH is humbly submitted to Your Majesty's Royal Wisdom.

CAMERON OF LOCHBROOM, Lord Advocate.

Dated the fourteenth of September 1984.

CASE on behalf of

PATRICK ANDREW WENTWORTH HOPE JOHNSTONE OF ANNANDALE AND OF THAT ILK.

The Claimant has presented to Her Majesty a Petition praying Her Majesty to adjudge and declare that he is entitled to the Title, Style and Dignity of Earl of Annandale and Hartfell in the Peerage of Scotland, created by Charter in 1662, and Her Majesty has been pleased to refer the said Petition to this Right Honourable House, by whom on it has been referred to the Committee for Privileges to consider and report.

The Claimant now begs to lay before this Right Honourable House the present case in support of his said Petition.

The Claimant believes that it will be found convenient that certain individuals to whom reference is made in the case, and who are included in the Pedigrees annexed hereto, should have added after their names in the case a number corresponding to the number placed before their names in the Pedigrees.

The Case for the Claimant falls under six principal heads:—

FIRST: The Annandale Charter 23rd April 1662 (Articles 1 to 8 of the Petition and hereinafter referred to as the "Charter 1662") operated not only as a grant of the territorial earldom to James Earl of Annandale and Hartfell (2) and the series of heirs therein specified, but also as a new grant of a title of Earl to James Earl of Annandale and Hartfell (2) and the same series of heirs. In the previous proceedings before the Committee for Privileges in relation to the Annandale Peerages (Note 1), the question of a peerage dignity created by the Charter 1662 was not considered. The present Petition is concerned only with the succession to the peerage dignity created by the Charter 1662. Under the entail of the Charter 1662, the succession upon the death of James Earl of Annandale and Hartfell (2) opened to the heirs male of his body; and, upon the failure of the heirs male of his body, in effect the succession opened to the heirs female of his body and their heirs male of the body of the eldest heir female.

SECOND: The family circumstances of the 1st Earl of Annandale and Hartfell (2), prior to the grants of 1661 and 1662, were such that there is evidence to suggest that he was anxious to secure that the succession to his estates and dignities should pass to his children male or female, rather than to distant collateral heirs male, whose very existence must have been in doubt.

THIRD: The Claimant submits that, upon the death of George third Marquis of Annandale (8) in 1792, the heirs male of the body of James Earl of Annandale and Hartfell (2) became extinct.

FOURTH: The Claimant submits that, upon the death of George third Marquis of Annandale (8), the succession under the entail of the Charter 1662 opened to James third Earl of Hopetoun (16) as heir female of the body of James Earl of Annandale and Hartfell (2).

FIFTH: The Claimant submits that, upon the death without male issue of James third Earl of Hopetoun (16) in 1816, the succession under the entail of the Charter 1662 again opened to the heir female of the body of James Earl of Annandale and Hartfell (2), namely Lady Ann Hope Johnstone (17), eldest daughter of James third Earl of Hopetoun (16). Furthermore, the Claimant who bears the name and arms of Johnstone submits that he is the heir male of the body of Lady Ann Hope Johnstone (17), and therefore is entitled to succeed in the character of heir of provision under the entail of the Charter 1662.

SIXTH: The Claimant submits that the Resolutions of the Committee for Privileges 1844 and 1879 do not prejudice his claim to the pcerage dignity of Earl of Annandale and Hartfell created by the Charter 1662, and that his claim in this respect is not *res judicata.* The possibility of presenting a claim to Earldom created in 1662 has been subject to consideration by the Hope Johnstones' legal advisers since about 1792.

FIRST HEAD

(i) Before the Union in 1707, titles of honour in the Peerage of Scotland were commonly created either by charter or by patent. In cases where a charter contained the original grant of a peerage dignity, invariably that charter also contained either the original grant of lands, or the *novodamus* of lands. In these charters the lands in question were not infrequently incorporated clause of *novodamus* into a territorial peerage or barony with the grant of the dignity. Both peerage dignity and the territorial dignity then descended to the same series of heirs.

At the beginning of the 17th Century many charters of former ecclesiastical lands passed the Great Seal. The lands were incorporated into free temporal lordships and baronies, and in the same charter the grantee and his heirs were created a Lord of Parliament with a title of honour. However, towards the middle of that century, it became less usual for a peerage dignity to be created by charter, the new creations being generally by letters patent separate from the Charter granting the territorial peerage. Nonetheless, the Great Seal Register provides instances throughout the 17th Century of peerage dignities created or regranted by charter, and there can be no doubt that this mode of creation was regarded as effective until the Union.

Towards the end of the 17th Century and immediately prior to the Union, there are several instances of Charters containing the *novodamus* of lands and titles of honour, where both have been resigned into hands of the Crown

for regrant to a new series of heirs. So far as lands were concerned, it was essential that a charter of resignation should proceed upon a procuratory of resignation. Where title of honour was to be settled upon a new series of heirs, it was usual for that title of honour to be resigned likewise; but resignation was not essential. There are instances of new grants to a new series of heirs of a title of honour of the same designation as one already granted which proceeded upon no resignation of that title of honour [e.g. The Earldom of Arran]. Thus the same title of honour has descended to two distinct series of heirs, or has been capable of so descending.

The format of Charters, which first granted or regranted lands with a new peerage dignity, usually followed the format that:—

(*a*) The King with advice and for certain reasons

(*b*) granted to X and a specified series of heirs

(*c*) named lands described in detail

(*d*) which were then erected into a territorial peerage

(*e*) and thereafter words indicative of the grant of the peerage dignity followed

(*f*) after which followed clauses of reservation, reddendo etc.

Clauses (*d*) and (*e*) above were sometimes included in a clause of *novodamus*. Where a charter granted a territorial peerage alone, the format was the same, except that the words indicative of a peerage grant are omitted after the lands are erected into a territorial peerage. However, towards the end of the 17th century, the charters of *novodamus*, which followed upon the resignations of lands and titles, took a different format. These Charters contained, in general, a clause of *novodamus* granting to:—

(*a*) a named person and a specified series of heirs

(*b*) the title and dignity

(*c*) with the lands specified in detail

(*d*) which lands are then erected into a territorial peerage

(*e*) with the reddendo and other clauses.

(ii) To operate as the effective grant of a peerage dignity, it was essential that a charter should contain clear and unambiguous words expressive of such a grant, and that the charter should pass the great seal. It was also essential that the charter should proceed upon a warrant (or signature) under the sign manual, likewise containing clear and unambiguous words expressive of the grant. Moreover, it was essential that, annexed to the warrant there should be a docquet containing a clear and unambiguous reference to the grant of a peerage dignity. Without these ingredients, a charter might be effective with respect to the grant of lands, but could not carry the grant of a peerage dignity. The Claimant makes reference to The Cassillis Peerage Claim 1762 (*Kennedy v. E. of Ruglen* (1762) 2 Pat55; Maidment Peerage Claims 1) and to the recent *Oxfuird Peerage Claim* 1977, in which these matters are discussed. It would appear that either a draft Warrant or the principal Warrant could be adjusted either by the Recipient or by the Crown. Reference is made to a draft of the Annandale Warrant and to the Warrant in respect of the Earldom of Airth [Airth Peerage Claim Minutes of Evidence 1839 page 20 *et seq.*]

The Claimant submits that the Charter 1662 contains all the above ingredients essential to carry the grant of a peerage dignity. The warrant contains clear and unambiguous words expressive of the grant of a peerage dignity (article 2 of the petition). The docquet annexed to the warrant contains a clear and unambiguous reference to such a grant (article 3 of the petition). The warrant is under the sign manual (article 4 of the petition). Following upon the warrant there passed the Great Seal a charter containing clear and unambiguous words expressive of the grant of the peerage dignity (article 5 of the Petition). The Claimant submits that the grant of the territorial earldom of Annandale and Hartfell and lordship of Johnstone "cum titulo stylo et dignitate comitis secundum datas diplomatum dict. consanguineo et consiliario nostro Jacobo comiti de Annandaill et Hartfell, et quondam ejus patri desuper concess" which appear in the clause of *novodamus* could only refer to the *de novo* grant of a territorial Earldom with a peerage dignity. In any event there was no territorial earldom prior to its creation by Charter 1662. Moreover, the Charter 1662 falls to be considered in the light of contemporary charters carrying the grant of a territorial earldom with the express grant of a Peerage dignity. It would appear that in the absence of any words expressive of the grant of a peerage dignity, such charters carry no grant of a peerage dignity. Reference is made to Appendix A for examples.

The Charter 1662 contains the regrant of lands which previously had been resigned by James Earl of Annandale and Hartfell (2) for regrant in favour of himself and a series of heirs ; the lands being erected by the clause of *novodamus* into the territorial earldom of Annandale and Hartfell and lordship of Johnstone. The *novodamus* clause of the charter contains the grant of the title and dignity of EARL, to the same series of heirs as the territorial earldom, which it is submitted is the grant of a separate title and dignity, albeit of the same name (i.e. The Earldom of Annandale and Hartfell) as that granted to James Earl of Annandale & Hartfell by Letters Patent n 1661. The claimant therefore submits that (standing the Resolution of the Committee for Privileges 1844) there are two peerage Earldoms of Annandale which bear the same name ; namely, the Earldom of Annandale and Hartfell created by Letters Patent in 1661, with limitations first to the patentee and his heirs male general, and the Earldom of Annandale and Hartfell created by charter in 1662, with limitations first to the grantee and the heirs male of his body.

There is no anomaly in there being two peerages of the same title and name, held by different persons. In the *Balfour of Burley and Kilwinning Peerage Claim 1868* Lord Chelmsford went so far as to say that "there can be no objection to two persons having the same title of nobility, of which many instances might be adduced." It is not uncommon for a title to be granted with a destination to one series of heirs and for the same title to be granted again to the same recipient with a different destination to take account of the fact that he by that stage has no heirs under the first destination. Examples of two titles of the same name being vested in different persons are given at Appendix B.

The Claimant submits with respect to the two peerage dignities, the Earldom of Annandale and Hartfell created by Charter 1662 has precedence immediately after the Earldom of Annandale and Hartfell created by patent 1661, with the precedence of 1643 ; this being the correct interpretation of the

expression "secundum datas diplomatum, etc." to be found in the Charter 1662. [Reference is made to "Observations upon the Law and Customs of Nations as to Precedency" by Sir George MacKenzie, Edinburgh 1680 Question XXI]

SECOND HEAD

James 1st Earl of Annandale and Hartfell (2) married (contract dated 29th May, 1645—Minutes 1876 page 576) Henrietta Douglas, then aged 13 years, eldest daughter by his second marriage of William 1st Marquess of Douglas. For the first six years of their marriage they had no children. In 1652 a daughter was born and four others followed in succession (Minutes 1876 page 735). Being without male issue, on 15th February 1655 the 1st Earl executed an Entail providing that in the event of his decease without heirs male of his body the succession to the titles and estates would open to the heirs female of his body (Minutes 1876 page 719/20).

With the death of his only brother William Johnstone of Blacklaws (12) in 1656 the collateral heirs male of the 1st Earl either became extinct or were to be found in a very remote line. It should be noted that throughout the claims to the Earldom and Marquessate during the 18th and 19th centuries, no family of Johnstone has been able to establish their connection as an heir male whatsoever of the 1st Earl.

On 14th May 1657 the 1st Earl executed a formal resignation of his titles and estates for a regrant in favour of the heirs male of his body whom failing to the heirs female of his body and the other heirs therein specified. The resignation was made into the hands of the Exchequer on 19th June 1657 (Minutes 1876 pages 268-274). No charter appears to have followed upon this resignation and in 1879 the Committee for Privileges (Speeches) determined to give no effect to this document. Nevertheless the Petitioner submits that these transactions can be taken to show that the 1st Earl was anxious to secure the succession to his title and dignities failing heirs male of his body, to the heirs female of his body before calling other heirs.

When the Letters Patent of 13th February 1661 were issued the 1st Earl had one son James (3) born 17th December 1660. William (4) who succeeded as 2nd Earl of Annandale and Hartfell was not born until 17th February 1664 (Minutes 1876 page 735). James died in infancy and may well have been a sickly child. The Petitioner submits that it is not inconceivable that, if James was in danger of dying, that the 1st Earl, realising the import of the destination in the Letters Patent of 1661, took steps to secure that another dignity of Earl should be included in the Charter, which passed the Great Seal on 23rd April 1662. The Petitioner further submits that the Draft Warrant (which cannot be dated wth any certainty relative to these events) is indicative of the fact that adjustments could and would be made by the 1st Earl or his advisers to take account of changing circumstances.

THIRD HEAD

With respect to the extinction of the heirs male of the body of James Earl of Annandale and Hartfell (2), the Claimant relies upon (1) his Genealogy recorded in the Public Register of All Genealogies and Birthbrieves in Scotland

(Volume IV, folio 65) conform to the Interlocutor of The Lord Lyon King of Arms dated 8th February 1984 [Reference is made to the *Oxfuird Peerage Claim* 1977, Lord Fraser of Tullybelton at page 109] and (2) the evidence taken before the Committee for Privileges in the 19th Century and printed in the Minutes of Evidencc. Although it appears that the Committee "were satisfied in regard to the Pedigrees" (*Minutes* 15th May 1834, p.87), certain research has revealed further information, concerning in particular the Hon. John Johnstone of Stapleton (10), hitherto believed to have died unmarried. (See Note 2). The male descendants of James Earl of Annandale and Hartfell (2) were as follows:—

(i) There were four sons of James 1st Earl of Annandale and Hartfell (2) by his marriage (1645) to Lady Henrietta Douglas. James Johnstone (3), the eldest son, died young *vita patris*. William, afterwards first Marquis of Annandale (4), the second son, succeeded his father in his titles and dignities, and died 12th January 1721, having twice married and having had male issue by both marriages. The Hon. John Johnstone of Stapleton (10), the third son, married (1713) Catherina Christina von Ahlefeldt, and died without male issue 1715. George Johnstone (11), the fourth son, died in infancy 10th May 1674.

(ii) There were three sons of William first Marquis of Annandale (4) by his marriage (1682) to Sophia Fairholm. James Lord Johnstone, afterwards second Marquis of Annandale (5), the eldest son, succeeded his father in his titles and dignities, and died without issue about 1730. John Johnstone (6), the second son, died in infancy about January 1694. Lord William Johnstone (7), the third son, dicd without issue 24th December 1721.

(iii) There were two sons of William first Marquis of Annandale (4) by his marriage (1718) to Charlotte Van Lore Vanden Bempde. Lord George Vanden Bempde Johnstone, afterwards third Marquis of Annandale (8), the eldest son, succeeded James second Marquis of Annandale (5) in his titles and dignities, and died without issue 29th April 1792. Lord John Johnstone (9), the second son, died without issue October 1742.

Accordingly, the Claimant submits that, upon the death of George third Marquis of Annandale (8), the heirs male of the body of James Earl of Annandale and Hartfell (2) became extinct.

FOURTH HEAD

The heirs male of the body of James 1st Earl of Annandale and Hartfell (2) having become extinct unpon the death of George third Marquis of Annandale (8), the Claimant submits that the succession under the second limitation of the entail of the Charter 1662 opened to the heir female of the body of James 1st Earl of Annandale and Hartfell (2) (article 1 of the Petition). Reference is made to the Petitioner's Genealogy recorded in the Public Register of All Genealogies and Birthbrieves in Scotland (Volume IV, folio 65). Although the meaning of the terms "heir female of the body" and "eldest heir female of the body" was once disputed, the law of Scotland as to this point would

now appear to have been settled. Reference is made to the *Fullerton v Hamilton* [*Bargony Case*] (1739) 1 Paton 237; 1 W & Sh App 1 & 2 and *Johnstone v Johnstone* (1839) 2 Dunlop 73. In order to establish that he was heir of provision under the entail of the Charter 1662, it was necessary for James third Earl of Hopetoun (16) to prove that, at the date when the succession opened under the second limitation, he succeeded in the character of heir female of the body of James Earl of Annandale and Hartfell (2). The Claimant submits that James third Earl of Hopetoun (16) succeeded in virtue of his descent as follows:—

(i) Lady Henrietta Johnstone (13), elder daughter by his first marriage of William first Marquis of Annandale (4) married (1699) Charles Hope of Hopetoun, and of her marriage there was issue. She died 25th November 1750.

(ii) The eldest son of Lady Henrietta Johnstone, Countess of Hopetoun (13) was John second Earl of Hopetoun (14), who married first (1759) Lady Ann Ogilvie, and by her had issue. He died 12th February 1781. (The present Marquis of Linlithgow, who is also Earl of Hopetoun in the Peerage of Scotland, is descended from a son of a subsequent marriage of John second Earl of Hopetoun (14)).

(iii) Charles Lord Hope (15), the eldest son by his first marriage of John second Earl of Hopetoun (14), having predeceased his father 6th June 1766 without issue, the Earl was succeeded in his title and dignities by the second but eldest surviving, son by his first marriage James third Earl of Hopetoun (16).

Accordingly, the Claimant submits that, upon the death of George third Marquis of Annandale (8), James third Earl of Hopetoun (16); who (having in addition to the name of Hope assumed the name of Johnstone) succeeded to the territorial earldom of Annandale and Hartfell, and lordship of Johnstone, as heir of provision under the entail of the Charter 1662; was entitled to succeed to the peerage dignity created by the Charter 1662, and was so advised. (See Note 1).

FIFTH HEAD

The Petitioner submits that the second limitation of the entail of the Charter 1662 (Article 1 of the Petition) is a "distributive destination" within the meaning of the law of Scotland; and that, accordingly, when the succession opened to an heir female of the body of James Earl of Annandale and Hartfell (2), upon the death of the person who succeeded in that character, the heir of provision would be the heir male (if any) of that person's body, or, failing an heir male of that person's body, the *next* person entitled to succeed in the character of heir female of the body of James Earl of Annandale and Hartfell (2). Reference is made to *McLaren on Wills and Succession*, 3rd Edition, Vol. 1, pp. 447-449 and the authorities there cited. James third Earl of Hopetoun (16) married (1766) Lady Elizabeth Carnegie, and by her had issue six daughters, the eldest of whom was Lady Ann Hope Johnstone (17). The Earl died 29th May 1816. As he died without heirs male of his body, the succession under the entail of the Charter 1662, in the claimant's submission, again opened to the heir female of the body of James Earl of Annandale and Hartfell (2), who,

on this occasion, was Lady Ann Hope Johnstone (17). Reference is made to the Petitioner's Genealogy, recorded in the Public Register of All Genealogies and Birthbrieves in Scotland [Volume IV, folio 65]. Lady Ann Hope Johnstone (17) married (1792) her cousin Admiral Sir William Hope Johnstone, and of her marriage there was issue, her eldest son being John James Hope Johnstone *primus* (18). Upon the death of Lady Ann Hope Johnstone (17), which occurred 28th August 1818, the heir of provision under the entail of the Charter 1662 was, in the Claimant's submission, the heir male of the body of Lady Ann Hope Johnstone (17), and thereafter the succession has opened to each person having the character of heir male of her body. The succession of the Claimant as heir male of the body of Lady Ann Hope Johnstone which was established by the Lord Lyon in his Interlocutor dated 14th October 1982 and in the Petitioner's Genealogy recorded in the Public Register of All Genealogies and Birthbrieves in Scotland (Volume IV, folio 65) can be demonstrated thus:—

(i) John James Hope Johnstone *primus* (18) married (1816) Alicia Anne Gordon, and by her had male issue. John James Hope Johnstone *primus* (18) dated 11th July 1876, having been predeceased by his eldest son William James Hope Johnstone (19), who died 17th March 1850.

(ii) William James Hope Johnstone (19) married (1841) the Hon. Octavia Sophia Bosville Macdonald, and by her had male issue. His eldest son, John James Hope Johnstone *secundus* (20) died without issue 26th December 1912.

(iii) The second son of William James Hope Johnstone (19) was Percy Alexander John Hope Johnstone (21), who married (1878) his cousin Evelyn Anne Hope Johnstone, and by her had male issue. Percy Alexander John Hope Johnstone (21) died 7th August 1899.

(iv) The only son of Percy Alexander John Hope Johnstone (21) was Evelyn Wentworth Hope Johnstone (22) who married first (1905) Eileen Briscoe, and by her had male issue. Evelyn Wentworth Hope Johnstone (22) died 26th October 1964, survived by his only son Percy Wentworth Hope Johnstone (23), who died on 5th April 1983 survived by his only son, the Claimant (24).

(v) The only son of Evelyn Wentworth Hope Johnstone (22) was Percy Wentworth Hope Johnstone of Annandale and of that Ilk (who was officially recognised by the Lord Lyon King of Arms in his Interlocutor dated 14th October 1982 as heir male and of line of the said John James Hope Johnstone (18) and Chief of the Name and Arms of Johnstone in the name of Johnstone of Annandale and of that Ilk) who married secondly (1940) (his first marriage to Phyllis Athena MacDonnell having been terminated by Divorce without male issue in 1939) Margaret Jane Hunter Arundell and had by her an only son the claimant Percy Wentworth Hope Johnstone of Annandale and of that Ilk died (5th April 1983) survived by his only son the present claimant.

In these circumstances the Claimant submits that he, being the heir male of the body of Lady Ann Hope Johnstone (17), who was the latest person to succeed in the character of heir female of the body of James Earl of Annandale and Hartfell (2) under the entail of the Charter 1662, is heir of provision

under the said entail and, as such, has the right to claim in virtue of the grant contained in the Charter 1662, the title, style and dignity of Earl of Annandale and Hartfell in the Peerage of Scotland.

The Petitioner has succeeded his father the late Percy Wentworth Hope Johnstone (23) in the name and arms of Johnstone of Annandale and of that Ilk matriculated in the Public Register of All Arms and Bearings on 16th February 1983.

SIXTH HEAD

The Claimant submits that the Resolution of the Committee for Privileges 11th June 1844 and 30th May 1879 are no bar to the presentation of his claim. The Resolutions concerned, respectively, the claims of John James Hope Johnstone *primus* (18) and John James Hope Johnstone *secundus* (20) to the peerage dignities created by patent 13th February 1661 (Article 9 of the Petition), and, but only in the case of the Resolution 30th May 1879, by patent 24th June 1701. Although the Committee for Privileges had evidence of the Charter 1662, and heard the argument of counsel to the effect that the Patent 1661 could be construed by means of the Charter 1662 ; at no time did the Committee for Privileges consider the question of a peerage dignity created by the Charter 1662, which is the substance of the present claim. Accordingly the present claim is not *res judicata.*

Although no claim has previously been laid by the Johnstones of Annandale to the peerage title of the Earldom of Annandale and Hartfell, created by the Charter 1662, the possibility of pursuing such a claim had been considered by their legal advisers. In 1739 Mr John Anstruther in an opinion for the Earl of Hopetoun considered the possibility of raising such a claim and John Riddell considered this point. In 1844 William Fraser, wrote to James Hope, that " Mr Riddell is clearly of the opinion . . . that if Mr Hope Johnstone fails under the Patent 1661, he will succeed under the Charter 1662, to the Dignity of Earl of Annandale & Hartfell." The proposition that there were two Earldoms of Annandale & Hartfell was canvassed by the claimant in 1872 (Case of John James Hope Johnstone of Annandale 1872 pages 30-1 & 66) although the tenor of the argument in that claim was that the Letters Patent 1661, should be construed with the Charter 1662.

The present claimant submits that no claim to the 1662 title has been put forward before, probably because the previous claims started on the basis of a claim to the Earldom created in 1661 and this factor may have influenced the thinking of the claimant's legal advisers. In addition, in respect of some of the claims, the Hope Johnstone family came in, in opposition to claims put forward by other Johnstone claimants to the titles created in 1661. In the claim of 1876, the Petitioner's forebears put forward a claim to the Marquessate of Annandale created 24th June, 1701 which had a limitation similar in substance to that of the 1661 Earldom. To succeed in claiming the Marquessate it was necessary to have the 1661 Letters Patent construed in the then Petitioner's favour and this may have influenced any decision not to found a claim on the 1662 Charter alone. Reference is made to the Case of John James Hope Johnstone of Annandale dated 1876.

The 1876 Claimant's Case was presented by his *Curator Bonis* and he remained under a curatory effectively until he died in 1912. By this stage the estate was considerably burdened by debt, which remained until the early 1970's. The Petitioner's grandfather, who resided mainly in Ireland, was more interested in field sports than pursuing any claim to the peerages. The Petitioner's father never inherited the estate and accordingly never had the finance to enable him to undertake a claim to the dignities. It was not until the mid 1970's that the Petitioner's family were again in a position to instruct the necessary research to prepare for the present claim.

JOHN MURRAY

C. H. AGNEW OF LOCHNAW

NOTE 1: OUTLINE OF PREVIOUS CLAIMS TO THE EARLDOM

Upon the death of George third Marquis of Annandale (8) in 1792, James third Earl of Hopetoun (16) succeeded as heir of provision under the entail of the Charter 1662 to the territorial earldom of Annandale and Hartfell, and lordship of Johnstone. He was advised of his right to claim the Annandale peerages created, not only by Patent 1661, but also by Charter 1662. In the event, his petition, which was referred to the Committee for Privileges was founded upon his construction of the limitations of the Patent 1661 ; however, his claim was not adjudged during his lifetime ; and a claim, similarly founded. by his eldest daughter Lady Ann Hope Johnstone (17) was also not adjudged during her lifetime.

The eldest son of Lady Ann Hope Johnstone (17), John James Hope Johnstone *primus* (18), in a like manner founded his claim to the peerage dignity created by patent 1661, and his claim was heard before the Committee for Privileges on various dates between 1825 and 1844. Other claimants appeared in the course of this hearing, the principal among those others being Sir Frederic John William Johnstone of Westerhall, Bart., who claims to be the heir male general of James Earl of Annandale and Hartfell (2). The argument before the Committee for Privileges turned principally upon the construction of the first limitation of the Patent 1661, and it was argued for John James Hope Johnstone *primus* (18) that, in the circumstances, the term " heir male " was to be constued " heir male of the body ". In 1834, the Lord Chancellor, Lord Brougham, made a speech in which he expressed views very favourable to the construction argued on behalf of John James Hope Johnstone *primus* (*Speeches* 15th May 1934, pp. 3–12), and wrote a letter to Miss Mary Hope Johnstone, the claimant's sister, addressing her as the daughter of an earl, and stating more forthrightly than in his speech his views on the success of her brother's claim However, in 1844, the Lord Chancellor, Lord Lyndhurst, and Lord Brougham delivered speeches unfavourable to the construction argued on behalf of John James Hope Johnstone *primus* (18) (Speeches 11th June 1844, pp. 13-17), and the Committee for Privileges resolved that he had not made out his claim. As Lord Lyndhurst, in his speech, observed that it was " not true practically . . . that heirs male general can never become extinct " (*Ib.*, p. 14), it was

reserved to John James Hope Johnston *primus* (18) that he should have the right to come in by a new petition claiming that the heirs male general of James Earl of Annandale and Hartfell (2) were extinct (*Ib.*, p. 18 ; see also Speeches 30th May 1879, p.91).

In January 1876, Sir William Fraser, a notable record scholar and genealogist who had been actively engaged on behalf of the Hope Johnstone family, made the discovery of a Bond of Tailzie and Resignation 1657 by James second Earl of Hartfell, afterwards Earl of Annandale and Hartfell (2). By this deed, the Earl had purported to resign into the hands of the Commissioners of Exchequer appointed during the Commonwealth both his lands and his titles of honour for regrant to himself and the heirs male of his body, whom failing the heirs female of his body, etc. As the time in question, the Earl had been married for about twelve years but no son had yet been born of the marriage. The Earl's only brother, Col. William Johnstone of Blacklaws (12), had died without issue in the preceding year, and it would appear that the Earl's heir male general (if any could be traced), to whom, in terms of the patents 1633 and 1643 (see Articles 7 and 8 of the Petition), the titles of honour would descend, would prove to be a very remote kinsman. Accordingly the Earl executed the deed, as the preamble narrates:—" speciallie for the weill and standing of our famelie honor and dignitie in our awin posteritie and children of our awin bodie . . . " (*Minutes* 24th July 1876, p.268).

The next hearings before the Committee for Privileges concerning the Annandale peerages took place between 1876 and 1881. In July 1876 John James Hope Johnstone *primus* (18) died, and in December of that year a petition was presented by his grandson, John James Hope Johnstone *secundus* (20), claiming not only the Earldom of Annandale and Hartfell etc. created by Letters Patent in 1661, but also the Marquessate of Annandale created in 1701, whose case was founded upon the discovery of the Bond of Tailzie and Resignation 1657 as a ground for enabling the Committee for Privileges to depart from the Resolution 1844 ; it being argued that the Patent 1661 was, in the light of the new evidence, capable of being construed in a manner favourable to this claimant. However, the Committee for Privileges declined to have regard to the effect of the Bond of Tailzie and Resignation, and resolved that no reason had been shewn for departing from the Resolution 1844 (*Speeches* 30th May 1879, p.90). The later proceedings of the Committee for Privileges concerned the claims of Sir Frederic Johnstone and Edward Johnstone of Fulford Hall to be heir male general of James Earl of Annandale and Hartfell (2), and it was resolved that neither of these claimants had made out his claim.

The present Claimant makes reference to the account of these proceedings contained in *The Annandale Family Book* by Sir William Fraser (Vol. 2, pp. 353–406) for the facts therein stated ; but under the reservation that Sir William's observations sometimes want impartiality.

NOTE 2: THE HON JOHN JONSTONE

The Hon. John Johnstone of Stapleton (commonly so called, although never designated " of Stapleton " during his lifetime) (10), third son of James Earl of Annandale and Hartfell (2), married 1713 Catherina Christina von Ahlefeldt,

daughter of Count Detler Sievert von Ahlefeldt and by her had issue, a daughter who died young. The Hon. John Johnstone of Stapleton (10) died 1715, and his widow subsequently remarried. In the Abstract of Evidence (pp. 6-7) reference is made to contemporary published correspondence, Catherine von Ahlefeldt's funeral oration and a History of the Ahlefeldt Family published in 1771 and the Report by Hugh Peskett, Esq., Genealogist, which shows that he died without male issue.

Although it would appear that the Hon. John Johnstone of Stapleton (10) was aged about 43 at the time of this marriage, there is no satisfactory evidence of any previous mariage. Earlier correspondence (such as is printed in *Minutes* 15th May 1834, pp. 59-63) makes no reference to wife or children, and the reversion of the lands of Stapleton (of which the Hon. John Johnstone (10) had a Charter 1702 to himself and the heirs of his body whom failing to William first Marquis of Annandale (4) and his heirs) also indicates that, in any event, he was survived by no issue. (See *Minutes* 15th May 1834, pp. 53-66).

It has, from time to time, been suggested that the Hon. John Johnstone of Stapleton (10) married one Elizabeth Belchier, and that he had issue by her; but research has failed to establish that any such marriage ever took place.

A statement apparently dated 1790 by one Gilbert Johnstone, which is capable of bearing the interpretation that the writer was a grandson of the Hon. John Johnston of Stapleton (10) has been investigated and shown to be unreliable in material respects. This statement clearly alleges that the sons of "John Johnstone Stapleton officer in Dumbarton Regt." included Gabriel Johnston Governor of North Carolina (1699-1752) and his brother Samuel; however, it can be established beyond reasonable doubt that Governor Johnston and his brother Samuel were the sons of the Revd. Samuel Johnston, Minister of Southdean during the last years of the 17th Century. Although the Claimant has considered it incumbent upon him to investigate this statement, he submits that no claim to the Annandale peerages could with propriety be founded upon it.

APPENDIX A

Notes on certain peerages etc. to which reference may be made during the course of the case for Patrick Hope Johnstone of Annandale, to illustrate the difference between signatures and charters, which erect land into a territorial peerage [Stair II 345—1981 Edn. page 372] and those which erect land into a territorial peerage and grant a peerage dignity.

1. *Examples of Grants of a Peerage Dignity contained in Charters of Land*

a. Lordship of Kinloss

By charter dated 2nd February 1601/2, James VI granted Edward Bruce, Commendator of Kinloss and his heirs and assignees, the lands and barony of Kinloss etc., the whole to be erected into a free temporal lordship and Edward Bruce was by this charter created a Lord of Parliament as Lord Kinloss. In 1868 (LJ 21st July 1868), it was held that this charter had created a peerage, which had descended to the 3rd Duke of Buckingham.

b. **Lordship of Balmerinoch**

By charter dated 20th February 1603, James VI granted James Elphinstone the lands of the dissolved abbey of Balmerinoch, which were erected into a territorial lordship and by the same charter created him a Lord of Parliament.

c. **Lordship of Holyroodhouse**

James Bothwell, who had been Commendator of the Abbey, received a charter dated 20th December 1607 of the lands of the abbey erected into a territorial lordship, with the title of Lord of Parliament.

d. **Lordship of Colville of Culross**

Sir James Colville, on 10th March 1604 had a charter of the lands of Culross and also it has been said of the dignity of a Lord of Parliament, but by charter dated 20th February 1609, he was, without a resignation, regranted the same lands with the same title. In 1723 the Committee of Privileges (LJ 1723) held that the second charter was operative in the creation of a peerage.

e. **Lordship of Ochiltree**

Sir James Stewart of Previck purchased the Lordship of Ochiltree from his cousin Andrew, Lord Ochiltree. Lord Ochiltree petitioned the King to transfer the title to Sir James Stewart. By letter dated 27th May 1615, the King wrote to the Privy Council instructing them to transfer the title to Sir James, who thereafter received a charter dated 9th June 1615 of the Lordship and barony, whereby he was created Lord Ochiltree.

f. **Lordship of Kintyre**

On 12th February 1626, James Campbell, eldest son of Archibald 7th Earl of Argyll was granted a charter which erected the lands of the barony of Kintyre into a free lordship and further created James Campbell a Lord of Parliament.

g. **Earldom of Airth**

A Charter dated 21st January 1633 in favour of William Earl of Menteith united the land and barony of Airth, erected into the earldom of Airth, with the earldom of Menteith, thus uniting two territorial earldoms. The same charter created William and his heirs Earls of Airth.

2. *Examples of the Charters of Baronets of Nova Scotia wherein both lands and titles are granted.*

In 1625 Charles I inaugurated the title and dignity of a baronet of Nova Scotia. By their charters of creation, the baronets created until about 1633, received a grant of 16,000 acres in Nova Scotia erected into a free Barony and Regality with other privileges and where granted in the charter, the title of baronet. Examples are:—

a. **Gordon, Premier Baronet**

On 28th May 1625, Sir Robert Gordon received a charter of lands in Nova Scotia, wherein he was created a baronet.

b. **Barrett of Newburgh**

On 17th October 1627 by Letters Patent Sir Edward Barrett and the heirs male of his body were created Lord Barrett of Newburgh. In the following year he received a charter dated 2nd October 1638, wherein he received lands in Nova Scotia and was again created a Lord of Parliament (with a destination to his heirs male whatsoever) rather than a baronet.

3. *Examples of Grant of Territorial Peerages alone*

a. **Lordship of Spynie**

On 6th May 1590 Alexander Lindsay had a Great Seal charter, which erected certain lands into the free Barony of Spynie and conferred the title of free Baron on him. In 1785 (LJ 15th April 1785 Maidment's Peerage Claims 2nd Edition page 85), it was held that this was not the grant of a peerage, but that the peerage was granted by separate investiture in the same year.

This charter should be contrasted with the charter of reinvestiture dated 17th April 1593, which appears to conjoin both the erection of the lands into a lordship and the creaation of the peerage title (Riddell, Peerage Law page 654 *et seq* and Scot Peerage—Spynie).

b. **Territorial Earldom of Cassillis**

On 29th September 1642, following on a resignatinon of all his lands, baronies and heritable offices, John 6th Earl of Cassillis received a regrant of the same erected into one free Earldom and Lordship called Cassillis. In 1762 (*Kennedy v. Earl of Ruglen* (1762) 2 Pat 55 ; Maidment's Peerage Claims 2nd Edn page 1) it was held that this charter conveyed only a territorial earldom.

c. **Territorial Earldom of Aboyne**

By Letters Patent dated 10th September 1660, Lord Charles Gordon was created Earl of Aboyne etc. By Charter of Charles II dated 14th April 1662, the lands and lordship of Aboyne etc. were incorporated into the territorial Earldom of Aboyne.

d. **Territorial Earldom of Orkney**

By charter dated 23rd April 1662 Charles II, on account of certain sums owed to George Viscount Grandison by him, granted to the Viscount the territorial earldom of Orkney and lordship of Zetland. This charter did not contain the grant of a peerage dignity but only a Territorial earldom and it is interesting to note that this earldom was only to exist until the wadset was redeemed.

e. **Territorial Earldom of Argyll**

On 16th October 1663, Letters Patent passed the Great Seal granting Archibald Lord Lorne, the peerage title of Earl of Argyll etc. On the same day a Charter passed the Great Seal granting Lord Lorne the territorial earldom of Argyll.

f. **Territorial Earldom of Airth (1680)**

A Signature was forwarded to Charles II, following the resignation by the Earl of Airth of his territorial and peerage Earldoms, for the regrant of both the title and the territorial earldom, to a new series of heirs. The Signature contained the appropriate docquet to support a resignation and regrant of both the titles and the territorial Earldom, but by letter dated 20h May 1680, Charles II indicated that he was not prepared to agree to the regrant of the peerage earldom, but would agree to the regrant of the territorial earldom alone. The Signaturc received the sign manual on 20th May 1680, under deletions, which include all references to the regrant of the peerage dignity. A Charter of the territorial Earldom alone, followed on 2nd May 1680. [Airth Peerage Claim, Minutes of Evidence 1839 pages 20 to 28]

4. *Examples of charters granting de novo both territorial peerages and personal dignities following a resignation*

a. **The Earldom of Erroll**

Gilbert 11th Earl of Erroll resigned his titles and office of Great Constable into the hands of Charles II and obtained a charter regranting the same dated 13th November 1666 to himself and a new series of heirs. Sir John Hay of Killour on succeeding under this charter as 12th Earl had a further charter following on from a resignation, of the title dignity and lands of Erroll dated 4th March 1674, again altering the succession.

b. **The Earldom of Rothes**

The Earldom granted in 1457 descended in the male line to John 7th Earl of Rothes, who resigned the lands and titles for a regrant, which he obtained by charter dated 4th July 1663, whereby the lands were erected into the territorial Lordship of Leslie and Earldom of Rothes and by the same charter he and the heirs therein specified were created Earls of Rothes etc.

c. **The Earldom and Lordship of Kilmarnock**

(1) *The Lordship of Boyd of Kilmarnock*: Having resigned his estates into the King's hands on 17th December 1591, Thomas 6th Lord Boyd had a regrant of the same by charter dated 12th January 1591/2 whereby the lands were erected into a free Lordship of Kilmarnock and by received opinion (Scots Peerage and GEC *sub nom* Boyd) he was created Lord Boyd of Kilmarnock.

(2) *Earldom of Kilmarnock*: William 3rd Earl of Kilmarnock (created 1661), having resigned his lands and peerages separately had a charter dated 22nd January 1707, wherein the lands and earldom were granted *de novo* to him and a new series of heirs.

d. **The Earldom of Stair**

The Earldom of Stair was created by Letters Patent on 8th April 1703. John 2nd Earl of Stair resigned his lands and honours and obtained a regrant of the lands and of the peerage with a new desination by charter dated 27th February 1707.

INDEX OF ILLUSTRATIVE CHARTERS etc.

APPENDIX B

Notes on examples, where two different peerages exist under the same name. The effect of two persons bearing the same title of Nobility is discussed in the *Balfour of Burley & Kilwinning Peerage Claim 1868*, where Lord Chelmsford held that there could be no objection to such a situation.

1. The Earldoms of Mar

There are two Earldoms of Mar. The ancient earldom created in the 12th century with a destination to heirs and that created in 1565 for John

6th Lord Erskine, heir general of the ancient Earldom, with a destination to heirs male of the body. These Earldoms are now held by different persons [Earldom of Mar [1875] 1 AC 1 and Earldom of Mar Restitution Act 1885].

2. The Earldoms of Arran

On 11th August 1503, James 2nd Lord Hamilton was granted a charter of the Earldom of Arran and two days later was 'belted' Earl. In 1581, James 3rd Earl resigned the Earldom in favour of James Stewart, who received a charter of the Earldom on 28th October 1581. In 1586, James Hamilton (denuded 3rd Earl) raised an action of reduction in the Court of Session against James Stewart, Earl of Annan, which was successful and he was restored to the Earldom.

On 12th April 1643, Letters Patent, proceeding on no resignation, were granted to James 3rd Marquess of Hamilton (heir male of the body of James 1st Earl of Arran) creating him Duke of Hamilton, Marquess of Clydesdale, Earl of Arran etc. to a particular series of heirs, including the eldest heir female of the body of the patentee.

Thus there are two Earldoms of Arran, one created in 1503 (presumably) to heirs male of the body, which could be claimed by the Duke of Abercorn (Complete Peerage *sub nom Arran*) and that created in 1643, presently held by the Duke of Hamilton.

Mention may also be made to the Irish Earldom of Arran created 1662.

3. The Earldoms of Morton

James Douglas was created Earl of Morton on 14th March 1457. The 4th Earl (Regent Morton) forfeited his titles and lands in 1581, but this forfeiture was reversed on 29th January 1585/6, when the Earldom reverted to the heir of tailzie, Sir William Douglas of Lochleven, who had a charter in 1589 confirming the lands and title to him.

Following the forfeiture of Regent Morton, on 29th October 1581, John 8th Lord Maxwell, had a grant of the territorial earldom of Morton and was created Earl of Morton. The grant of the territorial Earldom was revoked in 1585, but it was held that this did not affect the grant of the Peerage title of Earl of Morton. In 1607, a dispute arose between the two Earls of Morton, regarding their respective rights and in 1621 the king, while confirming that the 10th Lord Maxwell had indeed inherited the title Earl of Morton, changed its name to Nithsdale. (Scots Peerage, *sub nom* Morton & Nithsdale)

4. The Earldoms of Lothian

On 16th June 1606 Mark Kerr, Lord Newbattle was created Earl of Lothian with a destination to the heirs made of his body. Robert 2nd Earl is said to have obtained a regrant settling the title on his daughter Anne, who married Sir William Kerr. When the heir male assumed the title on Earl Robert's death in 1624, he was forced to give up the title by Charles 1, who created Anne, Countess *de jure's* husband Sir William Kerr, Earl of Lothian on

30th October 1631. Although the case is not without difficulty, it would appear that there are in existence two Earldoms of Lothian, now settled in the same series of heirs (Riddell, Peerage Law page 73 *et seq*).

5. The Earldoms of Kincardine

By letters patent dated 26th December 1647 Edward Bruce was created Earl of Kincardine etc., a title now held by the Earl of Elgin. On 6th May 1644 The Earl of Montrose was created Marquess of Montrose, Earl of Kincardine etc. and on 24th April 1707, the Marquess was created Duke of Montrose, Marquess of Graham and Buchanan and Earl of Kincardine etc. These latter two Earldoms of Kincardine are still held by the Duke of Montrose.

6. The Lordships of Douglas of Hawick and Tibberis & Viscountcies of Drumlanrig

On 1st April 1628, Sir William Douglas was created Lord Douglas of Hawick and Tibbereis, with a destination to his heirs male whatsoever, and on the same day he was separately created Viscount of Drumlanrig, Lord Douglas of Hawick and Tibberis, to the same heirs.

On 13th June 1633 he was created Earl of Queensberrie, Viscount of Drumlanrig, Lord Douglas of Hawick and Tibberis, with a destination to heirs male of the body.

On 13th June 1633 there were therefore three Lordships of Douglas of Hawick and Tibberis, two with the same destination and two Viscountcies of Drumlanrig, with different destinations.

7. The Baronies of Sheffield

On 9th January 1781, John Baker was created Baron Sheffield in the Peerage of Ireland with a destination to the heirs male of his body. On 20th September 1783, he was again created Baron Sheffield in the Peerage of Ireland with a destination failing male issue, to the two daughters of his first marriage and their male issue. On 29th July 1802 he was created Baron Sheffield in the Peerage of the United Kingdom and on 16th January 1816 was advanced to the Earldom of Sheffield in the Peerage of Ireland. Both the later peerages were destined to the heirs male of his body.

8. The Dukedoms of Fife

Alexander, 6th Earl Fife in the Peerage of Ireland was created Earl of Fife in the Peerage of the United Kingdom on 13th July 1885. Following his marriage to H.R.H. Princess Louise he was created Duke of Fife with a destination to the heirs male of his body. Having no male issue he was created again Duke of Fife on 16th October 1899 with a destination in favour of his heirs male of the body and in default thereof to his first and other daughters by his wife H.R.H. Princess Louise, and the heirs male of their bodies.

9. The Earldoms of Mansfield

There are two earldoms of Mansfield in the peerage of Great Britain, that created on 31st October 1776 and that created on 1st August 1792. They each had a different destination and separated on the 1st Earl's death, although they are again united in the same person. (Complete Peerage *sub nom* Mansfield).

10. Peerages of the same name in different ranks

There are many peerages of the same name, but in different ranks and often of different creations, which have settled in different lines. Examples are:—

a. The Dukedom and Earldom of Sutherland.

b. The Dukedom and Marquessate of Queensberry.

c. The Dukedom of Hamilton and the Marquessate of Hamilton (held by the Duke of Abercorn).

MINUTES OF PROCEEDINGS

DIE LUNÆ, 17° JUNII 1985

Lords present:

Aberdare, L.
Beswick, L.
Brightman, L.
Caccia, L.
Campbell of Alloway, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair.

The Orders of Reference are read.

Counsel and Parties are called in.

The Lord Advocate (Rt. Hon. Lord Cameron of Lochbroom) and Mr. J. G. Reid appear on behalf of the Crown.

Mr. J. Murray, Q.C. and Sir Crispin Agnew of Lochnaw appear on behalf of the Petitioner.

The Lord Advocate is heard on behalf of the Crown.

Mr. J. Murray Q.C. is heard on behalf of the Petitioner.

Mr. D. Bogie is called in, sworn and examined.

Mr. Hugh Peskett is called in, sworn and examined.

Ordered, That the Committee be adjourned until tomorrow at half-past Ten o'clock.

DIE MARTIS, 18° JUNII 1985

Lords present:

Aberdare, L.
Beswick, L.
Brightman, L.
Caccia, L.
Campbell of Alloway, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

Mr. Hugh Peskett is further examined.

Professor Gordon Donaldson is called in, sworn and examined.

Ordered, that the Committee be adjourned until tomorrow at half-past Ten o'clock.

DIE MERCURII, 19° JUNII 1985

Lords present:

Aberdare, L.
Beswick, L.
Brightman, L.
Caccia, L.
Campbell of Alloway, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

Professor Gordon Donaldson is further examined.

Professor J. M. Halliday is called in, sworn and examined.

Mr. Murray is again heard on behalf of the Petitioner.

Ordered, that the Committee be adjourned until tommorow at half-past Ten o'clock.

DIE JOVIS 20° JUNII 1985

Lords present:

Aberdare, L
Beswick, L.
Brightman, L.
Caccia, L.
L. Keith of Kinkel
L. Scarman
L. Templeman

The Lord Keith of Kinkel in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

Mr. Murray is further heard on behalf of the Petitioner.
The Lord Advocate is again heard on behalf of the Crown.

The Petition for leave to dispense with proof of certain documents and to dispense with translation of Latin documents is *withdrawn.*

The Petition for leave to dispense with formal proof of heirship is *agreed to.*

Ordered, that the Committee be adjourned to Tuesday 23rd of July next at half-past Ten o'clock.

DIE MARTIS 23° JULII 1985

Lords present:

Aberdare, L.
Brightman, L.
Caccia, L.
Campbell of Alloway, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair.

The Order of Adjournement is read.

The Proceedings of the 20th June are read.

The Opinions of Lord Keith of Kinkel, Lord Scarman, Lord Brightman, and Lord Templeman are laid before the Committee.*

Resolved, That it is in the public interest that the Minutes of Proceedings be printed.

Resolved, That it is the Opinion of the Committee—

(1) that by Signature and Charter under the Great Seal of Scotland both dated 23rd April 1662, His Majesty King Charles the Second created in favour of James, First Earl of Annandale and Second Earl of Hartfell a title and dignity of Earl of Annandale and Hartfell separate and distinct from the titles and dignities of Earl of Hartfell and Earl of Annandale created respectively by Letters Patent dated 1643 and Letters Patent dated 13th February 1661 ;

(2) that under the said Signature and Charter the limitation of the said title and dignity was to the heirs male of the body of James, First Earl of Annandale and Hartfell, whom failing to the heirs female without division of his body and heirs male of the body of the said eldest heir female, whom all failing to the nearest heirs and assignees whomsoever of the said James, First Earl of Annandale and Hartfell ;

(3) that the heirs male of the body of James, First Earl of Annandale and Hartfell are extinct ;

(4) that the Petitioner is the heir male of the body of Lady Anne Hope Johnstone, who was the eldest heir female of the body of James, First Earl of Annandale and Hartfell and ;

(5) that the Petitioner Patrick Andrew Wentworth Hope Johnstone is now entitled of right to the title and dignity of Earl of Annandale and Hartfell in the peerage of Scotland created by the said Signature and Charter.

Ordered, That the Lord in the Chair do report the said Resolutions to the House†.

* For Opinions, see page 144.

† For Report, see page xliv.

REPORT FROM THE COMMITTEE FOR PRIVILEGES

ORDERED TO REPORT:—

That the Committee have met and have considered the Petition of Patrick Andrew Wentworth Hope Johnstone of Annandale and that Ilk to Her Majesty praying that Her Majesty will be graciously pleased to admit his succession to, and declare him entitled to, the title, honour and dignity of Earl of Annandale and Hartfell in the peerage of Scotland and that Her Majesty will be graciously pleased to direct that a writ of summons to Parliament be issued to him by the name and style of Earl of Annandale and Hartfell.

That the Committee have heard Counsel and witnesses on behalf of the Petitioner and the Lord Advocate on behalf of the Crown and have come to the following Resolutions:—

(1) that by Signature and Charter under the Great Seal of Scotland both dated 23rd April 1662 His Majesty King Charles the Second created in favour of James, First Earl of Annandale and Second Earl of Hartfell a title and dignity of Earl of Annandale and Hartfell separate and distinct from the titles and dignities of Earl of Hartfell and Earl of Annandale created respectively by Letters Patent dated 18th March 1643 and Letters Patent dated 13th February 1661 ;

(2) that under the said Signature and Charter the limitation of the said title and dignity was to the heirs male of the body of James, First Earl of Annandale and Hartfell, whom failing to the heirs female without division of his body and heirs male of the body of the said eldest heir female, whom all failing to the nearest heirs and assignees whomsoever of the said James, First Earl of Annandale and Hartfell ;

(3) that the heirs male of the body of James, First Earl of Annandale and Hartfell are extinct ;

(4) that the Petitioner is the heir male of the body of Lady Anne Hope Johnstone, who was the eldest heir female of the body of James, First Earl of Annandale and Hartfell and ;

(5) that the Petitioner Patrick Andrew Wentworth Hope Johnstone is now entitled of right to the title and dignity of Earl of Annandale and Hartfell in the peerage of Scotland created by the said Signature and Charter.

SPEECHES OF COUNSEL, ETC.

before

THE COMMITTEE FOR PRIVILEGES

to whom was referred

THE PETITION of PATRICK ANDREW WENTWORTH HOPE JOHNSTONE OF ANNANDALE AND OF THAT ILK, claiming to be EARL OF ANNANDALE AND HARTFELL in the PEERAGE OF SCOTLAND

Monday the 17th of June 1985

Lords present:

Aberdare, L.	Campbell of Alloway, L.
Beswick, L.	Keith of Kinkel, L.
Brightman, L.	Scarman, L.
Caccia, L.	Templeman, L.

The Lord Keith of Kinkel in the Chair

The Order of Reference is read.

The Petition of Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk, Chief of the Name and Arms of Johnstone, claiming the Title, Honour and Dignity of Earl of Annandale and Hartfell in the Peerage of Scotland.

Counsel and Parties were ordered to be called in.

Mr J. MURRAY, QC, and Sir CRISPIN H. AGNEW OF LOCHNAW, Bt., appeared for the Petitioner.

The LORD ADVOCATE (The Rt. Hon. The LORD CAMERON OF LOCHBROOM, QC) and Mr J. G. REID appeared on behalf of the Crown.

Chairman.] Lord Advocate, do you begin?

The Lord Advocate.] Yes, my Lord.

May it please your Lordships, in this matter I appear for the Crown, along with my friend Mr Reid, and the Petitioner is represented by my learned friend Mr Murray and Sir Crispin Agnew of Lochnaw.

My Lord, this is, I think, the first claim of privilege in which the Crown procedure and representation before your Lordship's Committee is in accordance with the scheme which was announced by the then Solicitor General at the outset of the proceedings of the Committee on the 28th March 1977, in the Oxfuird peerage claim.

Since the dignity which is the subject of *this* claim bears to be that of the peerage of Scotland, one created under the law of Scotland prior to the Union of the Parliaments in 1707, the Petition to Her Majesty was accordingly lodged with the Secretary of State for Scotland. The report to the Sovereign in fact forms part of the papers before this Committee and was made by myself, as Lord Advocate. In *that* capacity, my Lords, I now appear before your Lordships as representing the Crown.

My Lords, as I apprehend *my* function before this Committee, it is to assist your Lordships, in whatever way I can, in your consideration of this claim the legal issues in which are governed largely by Scots law. In that regard, I have made a report to the Sovereign upon the claim, and in particular on whether the Petitioner appears to have a prima facie case. That report will be with your Lordships' papers. It was in response to that report that Her Majesty graciously referred the claim to your Lordships' House for further consideration.

Since I made that report, in September 1984, the Petitioner has elaborated certain aspects of his case, but, my Lords, I am content, without suggesting that these elaborations do not advance his case further, to adhere to my report and to tell your Lordships that I do not seek to make any material adjustments to it.

My Lords, there are two preliminary Petitions which I think are before your Lordships. So far as those are concerned, they have each been notified to me at an earlier stage; I have had an opportunity to consider them, and it is right and proper that I should indicate to your Lordships that I have no objection to offer to the proposal that they be granted in the terms suggested. There may be a particular matter which would concern your Lordships so far as the 1662 Charter is concerned—which, of course, is in Latin—as to translation. However, my Lords, I should simply indicate at this stage that subject to anything that your Lordships may wish to decide in these——

Lord *Scarman.*] My Lord Advocate, can you help an Englishman? The Charter is in Latin, the signature is in English, is that right?

The Lord Advocate.] That is correct, I think, yes.

My Lords, if I may now turn to the claim itself. I would, in passing, refer to the fact that there are, I think, seven separate letters and associated documents which have been received, I think, by your Lordships' Clerk—one of them, indeed, I think is, or was, addressed to myself—which comment upon the merits of the present Petition. I think I am right in saying that none of them, either in substance or in form, amounts to a Petition to the Sovereign claiming the dignity which is the subject of the present proceedings. Therefore, I would, with respect, suggest that the question for your Lordships still remains whether or not the present Claimant, Patrick Andrew Wentworth Hope Johnstone, has made out his claim.

I will return to the seven separate matters or seven separate representations which have been made, if I may, in due course, but I would at *this* stage, if I may, just address the Committee very briefly on the claim itself.

My Lords, the Petitioner's contention is that the dignity to which he lays claim was created by the Charter of 1662 and not the Patent of 1661. As I apprehend it, his case is that there are, or may be, two earldoms of Annandale and Hartfell, one based on the Patent of 1661 and the other on the Charter of 1662.

Lord *Scarman.*] His case really is "may be", is it not? It is enough for him if he establishes that the 1662 Charter creates a title of honour?

The Lord Advocate.] Absolutely, my Lord. My Lord, as I understand it, he seeks first of all to maintain that the various hearings that have been before your Lordships' House in Committees in the past, to make out a claim to the peerage of Annandale and Hartfell, do not have the effect of barring the present claim by the principle of *res judicata* (that is, the legal principle which prevents successive claims on the same ground). As I understand it, the Petitioner will seek to show that the previous claims which failed, and which might have so barred the claim, were in fact based on different grounds, namely the creation of the earldom by the Patent of 1661 and the destination of *that* particular dignity.

As my Lord Scarman has just said, my Lords, the kernel of the case is in fact the 1662 Charter. I would suggest that in order to succeed under that Charter he would require to satisfy your Lordships as to two principal matters. The first is that the Charter created the dignity of an earldom in the peerage of Scotland. My Lords, in this regard, your Lordships will no doubt wish to bear in mind the distinction between a territorial earldom and a peerage earldom (that is to say, the dignity). The second matter is that he is within the destination of the 1662 Charter, and in particular the second limitation referring to heirs female.

My Lords, it may well have occurred to your Lordships, in reading the papers, to wonder that if the 1662 Charter *was* a bar to creating a peerage within whose destination the present Petitioner may lie, why was it that none of his predecessors saw fit to base these previous claims, at least in part, if not wholly, on that Charter, but rather to rely upon the Patent of 1661; and why it is that if both the Patent of 1661 and the Charter of 1662 create an earldom, a peerage dignity, how it was that such duplication came to take place. My Lords, these will, I suggest, be matters to which your Lordships would wish to address your minds in listening to the evidence. However, most important of all, I suggest your Lordships would wish to be satisfied that the Charter was the appropriate kind of document, and the circumstances in which it proceeded were the appropriate ones to create a peerage dignity; and that the critical words in that Charter, which begin with the words "*Cum titulo*", are, both in themselves and in their context, capable of having the effect contended for by the Petitioner.

It will not, I suggest, have escaped your Lordships' scrutiny of the papers that in my report to the Sovereign, in which I concluded that it appeared to me that the Petitioner had established a prima facie case, I did not commit myself on the question of the effect of the Charter of 1662, beyond saying that the Charter *may* have created and granted the dignity contended for. In this respect, obviously, your Lordships will wish to consider very carefully the evidence produced and the arguments put forward for the Claimant.

My Lords, on the second matter (namely, whether the Petitioner is within the destination of the Charter of 1662), it is, I think, a matter which your Lordships will be aware of, that the Lord Lyon has, as regards the arms to the Annandale and Hartfell destination, accepted that the present Claimant is entitled to the arms and names of the Lordship of Annandale and Hartfell, upon material which is essentially the same, which will be before your Lordships in this claim. I would simply, in passing, refer, my Lords, to the speeches which were made by certain of their Lordships in the previous claim, the Oxfuird peerage claim, about the use which may be made of Lord Lyon's Interlocutor in this matter.

Accordingly, my Lords, if I may pass from the claim itself and turn to the various representations which have been made, simply, if I may, to indicate what I understand to be the substance of them, and to assist your Lordships in that matter.

The first one, my Lords, that I would refer to is the claim of Mr J. D. Hobson, which is in the form of a letter dated the 19th March 1985, and an appendix containing a note relating to his claim and the family tree. In his particular letter Mr Hobson refers to a document which he claims dates from about 1850 entitled "Notes on the Family Tree of William Johnstone of Granton". I may say, the document itself has not been produced, but the narrative of the claim sets out the common ancestry between the line through which the present Claimant, Mr Patrick Hope Johnstone, descends, and

the line through which one of the 19th Century claimants, Sir Frederick John William Johnstone, sought to establish that *he* was descended.

My Lords, from a scrutiny of these documents, it would appear that the claim of Mr J. D. Hobson is in fact very similar to that of the late Sir Frederick John William Johnstone, whose claim was held *not* to have been made out by the Committee, on the 20th July 1881. My Lords will find, I think, a reference to the Committee's finding in *that* matter, in the second full volume, in the very last page of that volume, which was the 20th July 1881, when the Committee were of the opinion that the Petitioner, Sir Frederick John William Johnstone, "has not made out his claim".

I think it would also be fair to say that Mr Hobson does not appear to have appreciated that the present claim is based not upon the Patent of 1661 or, indeed, the marquisate created in 1701, but upon the Charter of 1662, with a different limitation.

My Lords, I would simply indicate to my Lords the view that *I* have formed: namely, that his arguments, based as they are on the limitation to heirs male whomsoever, are not relevant to the present proceedings and would not require to be taken into further consideration by your Lordships.

The next person who made representations was a Mr James Johnston Law, in a letter to your Lordships' Principal Clerk in January of this year, in which he informs the Principal Clerk that his ancestor was made Lord Johnston of Lockwood by King Charles the First. My Lords, he also makes reference, in his very short letter, to the marquisate of Annandale created in 1701.

My Lords, I have examined a copy of the letter. He suggests that he has the greater claim to the peerage dignity under discussion. However, it is really impossible to form *any* view upon the strength or weakness of what he is alleging, as the basis of it is really wholly unclear. Obviously the matters will be, in a sense, dealt with when one considers the present claim, the issue of whether peerage dignity is created under the 1662 Charter, and whether the present Claimant is the person to whom it has now descended under the limitations placed upon that dignity.

The third set of representations has been made by the Soutter family. This arose, first of all, under a letter dated the 24th January of this year, written by Mr Alan Soutter, which was followed by a further letter from his cousin, Mr William Soutter, dated the 28th March of this year. In those letters, my Lords, the representations appear to have been based upon the view—which I suggest is wholly erroneous—that the success of the present Petition depends upon the extinction of heirs male whomsoever of James the Earl of Annandale and Hartfell; that is to say, that it wrongly assumes that the present claim founds upon the limitation in the Patent of 1661.

However, my Lords, Mr Soutter—that is, Mr William Soutter—has, since March of this year, written once again, with a memorandum, by letter dated the 28th May of this year. He observes firstly, in that memorandum, that there were no changes of circumstances between 1661 and 1662, such as to justify the change in the terms of the limitation. My Lords, that is referred to specifically in paragraphs 11 and 12 of the accompanying memorandum. I think it is fair to say that this matter is dealt with in the Petitioner's case and no doubt will be expanded upon in due course. It appears in references in the Petitioner's case at pages 34C, and between 42B and 44A in the case. There is also reference in my report, perhaps somewhat indirectly, at page 28, letters C to D of the case.

Secondly, my Lords, Mr Soutter contends that the series of limitations in the Patents were designed to ensure that the dignities were enjoyed by males. That is in paragraph 14 of his memorandum. I would simply say that in *this* matter I have considered the substance of what he says, and I think it is only right to say at this stage that I do not find his logic particularly convincing, but obviously my Lords would wish to look at this matter in the light of the evidence led.

Thirdly, my Lords, he raises the question of the adjustment of the Warrant, which again is referred to, I think, in the case. Obviously, my Lords, this is again a matter which your Lordships

will wish to bear in mind as the evidence is being led. In my report, at page 24D, I make reference to this matter.

Fourthly, my Lords, he refers to the failure——

Lord *Scarman.*] Mr Soutter's memorandum does have the advantage over the other letters that it is directed to some of the points that we have to consider?

The Lord Advocate.] Indeed, my Lord.

Lord *Scarman.*] The effectiveness of the 1662 Charter?

The Lord Advocate.] That is so, my Lord.

Lord *Scarman.*] Even though it comes from the Sittingbourne branch of this Scottish family, it is entitled to respect.

The Lord Advocate.] Indeed, my Lord. Wherever anything came from, it would certainly be entitled to respect. However, I accept entirely, I think, that of *all* the representations that have been made, it is the only one that really addresses itself——

Lord *Scarman.*] Yes, it addresses itself to the points we have to consider.

The Lord Advocate.] That is so. Although it is not formally a competing claim, it underlines some of the features.

Lord *Scarman.*] It is a pretty good effort, granted the opportunities for Scottish research in Sittingbourne!

The Lord Advocate.] I suggest that the search of the family may have been going on for some years.

Lord *Scarman.*] I think so.

The Lord Advocate.] With possibly some assistance in Scots law.

My Lords, the next matter he refers to is the failure, in the previous claims, to found upon the Charter of 1662. I have already referred to this, and it is quite clear from the Petitioner's case that there will be representations on this matter.

Fifthly, my Lord, he draws attention to the Act of the Scots Parliament in 1663, the Act for changing the name of Souter of late used by the name of Johnstone. My Lords, the inference which Mr Soutter (who now has two t's as opposed to one in the Act of the Scottish Parliament) makes, I think could be somewhat speculative, but it will obviously be important that my Lords should look at this matter. I would suggest that it could. even on what is said in the memorandum, perhaps be of *some* interest that he suggests in the paragraph in which it appears — paragraph 16 — that the reason for this was, I think, the absence of heirs male and the desire of the then Earl to extend the succession to the heirs female. That, while it could be said to be speculation by Mr Soutter, may throw some light upon the background which obviously the Petitioner will wish to expand in evidence.

My Lords, so much, then, for the Soutter memorandum which, I would suggest, as my Lord Scarman has already indicated, is something to which my Lords should pay regard, because it does seem to raise some important questions.

The next matter is the representation by Mr John Michael Johnstone, dated the 29th May of 1985, this time from somewhat further afield than Sittingbourne, from Spain. I think that all I can say is that the basis of it is far from being clear, but I would suggest that he seeks to claim descent as an heir male. All I would simply say is that the evidence in relation to heirship will obviously be a matter which will obviously, my Lords, most certainly be important in regard to this and other representations.

My Lords, the next representation to which I would refer is that by Miss Treffgarne, in the letter dated the 12th May 1985. This representation appears to be based upon the text of part of a notebook apparently kept by her paternal grandfather, William Howard Williams-Treffgarne. My Lords, the line of descent through which this claimant stems appears to be from a branch of the Johnstone family said to have been settled in Ireland by the end of the 17th Century. A rough family tree has been produced, and this *would* bear close

resemblance to part of the pedigree produced and founded upon by the late Sir Frederick John William Johnstone of Nesterhall who made, of course, the claim based upon the Patent of 1661. If *that* is so, then, of course, this matter has already been a matter before a Committee of your Lordships' House, as I have already referred to.

As far as I could see, my Lords, the line of descent founded upon, according to the pedigree produced, appears to be traced back to an uncle (that is to say, an ascendant of the First Earl of Hartfell), and accordingly the question of the limitation in the Charter of 1662, if it *be* a peerage dignity being created, is, of course, to heirs male of the body. That would seem at the outset to deal with this particular claim as making it entirely irrelevant.

My Lords, the next representation is that by Sir Frederick Johnstone, in a letter dated the 27th February 1985. It is enough, I think, again to say that his ancestor was again Sir Frederick John William Johnstone of Nesterhall, and he adduces no detailed grounds at all. However, again I would suggest that this is a matter covered by previous decision of this Committee.

Finally, my Lords, we come to the representation by Mr James D. Johnstone, in a letter dated the 11th February 1985, from Georgetown, South Carolina. This representation is based upon the claim that the extinction of John Johnstone, or rather the extinction of a line descending from John Johnstone of Stapleton, has not been proved. My Lords, again this, as I understand it, is to be a matter which will be the subject of evidence and, indeed, is referred to in certain of the documents which have been produced by the Petitioner. If the Committee are satisfied by the evidence of heirship which will be led by the Petitioner, then the whole basis of this objection again falls. It is really related to saying that there is still a line directly descended from the second Earl, which is in existence. Of course, that plainly would exclude the present Claimant.

My Lords, I think I would merely say that the argument upon which this representation proceeds is that there is material to show that the ancestor, John Johnstone of Stapleton, married twice, and that there was issue of his first wife, Elizabeth Belchier. I merely think I would remark at this stage that there has been no material, nor any documentary evidence, nor even, indeed, oral evidence produced to me to substantiate that claim; and, of course, there is reference to it in the documents which the Claimant has produced.

My Lords, I would hope that these preliminary remarks would be of some assistance to your Lordships in consideration of the representations and evidence which will be led. I will, of course, be in attendance upon your Lordships throughout the Committee hearing, to assist your Lordships in any way in which I can.

Chairman.] Thank you, Lord Advocate. Then Mr Murray.

Mr *Murray.*] May it please your Lordships, I appear for the Petitioner in this matter, along with Sir Crispin Agnew.

I would wish at the outset to refer, my Lords, to the two preliminary matters which have formed the subject of the preliminary Petitions to your Lordships.

The first of these, in the print at page 106 and following, is a Petition to dispense with formal proof of the heirship of my client, Patrick Andrew Wentworth Hope Johnstone of Annandale and of that Ilk, in respect of his heirship under the destination contained in the Charter of 23rd April 1662.

My Lords, I do that for two principal reasons. The first is that there has been, before your House, on previous occasions, the question of the heirship of my client and his family in relation to the destination or destination in favour of heirs female. My Lords will recall that in this matter that which was before the House in 1834, 1844 and again in 1879, was the issue of the construction of the limitation in the Patent of 1661, and what meaning should be given to the words "*heredes masculi*". The view which their Lordships took in 1844 was that "*heredes masculi*" meant "heirs male whomsoever", therefore that unless the extinction of heirs male whomsoever could be proved, the second limitation in that Patent to heirs female did not open, and that in the circumstances that was an end of the matter, in the

absence of proof of extinction of heirs male. The matter came back before this House in 1879 when this House adhered to the determination in 1844.

The reason why I refer to it at this stage, in respect of my Petition to dispense with formal proof, is that then, as now, my client's branch of the family could only come in as heirs female. In the Minutes of 15th May 1834, the Committee, having heard evidence that day, on behalf of John James Hope Johnstone of Annandale, to prove the extinction of certain members of the family who might have had prior title as being heirs male of the body (because his contention was for heirs male of the body, and he had to prove the extinction of heirs male of the body), indicated on that date that further evidence was not necessary in that respect, as the Committee were satisfied in regard to the pedigree. That is all on page 87.

Chairman.] Whereabouts is that?

Mr *Murray.*] My Lord, that is on page 87. My reference there is, I am afraid, to the Minutes of previous proceedings.

Chairman.] Page 87 of which bundle? It is your Abstract of Evidence, is it?

Mr *Murray.*] That is an Abstract of Evidence, yes, my Lord. I have referred to the Minutes of Evidence when I said that.

Chairman.] Let me look at page 87 of your Abstract of Evidence first. It is not in there.

Mr *Murray.*] I am sorry, my Lord, that is my fault. It is not in the Abstract of Evidence, it is in the Minutes of Evidence, which is the full volume that has been printed.

Lord *Scarman.*] It is an uncoloured volume, is it, Mr Murray?

Lord *Campbell of Alloway.*] There is something at page 9, of Lord Brougham's opinion of 1834, I think; it is towards the end of the second printed volume, the last paragraph. He deals with the point.

Mr *Murray.*] No, my Lord. It lies behind, my Lord.
I was referring to the printed Minutes of Evidence on the day on which Lord Brougham made his observations.

Chairman.] We have not got a copy of that, have we?

Mr *Murray.*] My Lord, I must appologise, the matter has not been printed.

Chairman.] It will be in the records of the House, but it has not been copied for the Committee?

Mr *Murray.*] It has not been copied for the Committee at the present stage, my Lord. Perhaps I could read it, as it is very short.

Lord *Templeman.*] Is not it in Lord Brougham's speech of 1834: "I have no hesitation whatever in giving my opinion to your Lordships that the Claimant has proved his pedigree exactly as he has laid it, and as his contention requires it to be made out." That is the speech of the 15th May 1834. It is at the back of the first pink volume, and it is on page 5 of his speech, halfway down. Assuming nobody in the House dissented from that, is not that good enough for our present purpose? That only takes you back to 1834.

Mr *Murray.*] I took it back to 1834. What I was meaning was that if the intimation was made to counsel for Mr Hope Johnstone in 1844 that it was unnecessary to proceed——

Lord *Scarman.*] Have not you got a very strong position with the finding of the committee on the 8th February 1844?

Mr *Murray.*] Indeed, my Lord, that is so.

Lord *Scarman.*] I myself think that Lord Chancellor's speech was the best bit of prose in the whole of English documents, but I do not think it helps on this point.

Mr *Murray.*] Well, my Lord, the second leg of this was that apart from the determination of this House in 1834 and again, I submit, in 1844, the position is that the Petitioner and his father before him were, by Interlocutors of the Lord Lyon, held to be heirs in terms of the relevant destination. The document of the Interlocutor of the Lord Lyon's Court is to be found at the back of the uncoloured bundle of papers, and that

in my respectful submission standing on the view of this Committee in the *Oxfuird* case would be sufficient evidence in respect of the heirship of my client. For those reasons, my Lords, I would formally move my Lords in terms of the Petition to dispense with proof of the heirship of the Petitioner.

Chairman.] Are there any particular matters that are of interest and relevance in connection, for example, with the letters from other individuals making representations on a claim which you might wish to lead evidence about anywhere? What I am concerned about is need we actually deal with this particular preliminary petition at this stage? In the *Oxfuird* case there was a similar petition which was not actually granted until we had heard all the evidence and arguments. Would that put you in difficulty?

Mr *Murray.*] I would endeavour not to waste your Lordships' time by leading a good deal of evidence about which documentary material had been produced.

Lord *Scarman.*] I suppose you want an indication from the Committee as we go along as to their views on each preliminary petition, because if the view was adverse to your case, you would want to call evidence, that is your problem, is it not?

Mr *Murray.*] This is why I am raising this matter at this stage, yes.

Lord *Scarman.*] On this preliminary petition you have got, looking at page 109, "... the Lord Lyon found that the Petitioner was entitled to record his Genealogy in the Public Register of All Genealogies and Birth Brieves in Scotland as *inter alia* Representer of the Family of Johnstone of Annandale in terms of the Charter of 1662." Now, what you want at this stage, I should have thought, was an indication as to whether in the face of that the Committee was going to call for your evidence?

Mr *Murray.*] I am obliged, because as I have stated I am anxious not to overload this Committee with evidence which may be unnecessary and unhelpful.

Chairman.] Obviously there is no question of us looking at every Retour of Service which the Lord Lyon has had before him and which no doubt he has examined very carefully before he decided anything.

Mr *Murray.*] My Lord, there is one matter in light of what my Lord in the chair has just said that I think I should mention, and that is what I shall call the American Johnstone claim——

Chairman.] The Carolina claim?

Mr *Murray.*] Yes. If my Lord has a copy of the Genealogy, a copy of it is at the back of the first volume——

Chairman.] Do you want us to look at the Lord Lyon's Genealogy?

Mr *Murray.*] It is the same as the Lord Lyon's Genealogy, and a copy of it has been inserted at the rear of the first volume, my Lord, and it is my understanding that if there was any claim in respect of the Carolina claimant, it would arise in relation to the gentleman who is number ten on the list, that is, John Johnston, described there as "Major General Polish Cavalry, born 1665, died 1714 at Przemysl in Poland", and who married a Danish lady, Countess Catharine Christin von Ahlefeldte, and she died in 1725 and he had one daughter, an only child, from 1714 who died in 1715 in infancy. That is the contention of the Petitioner—that that is his only mrriage and that was his only issue.

Chairman.] Well, you have got Mr Peskett's second report, which refers to a certain amount of material which looks pretty convincing with regard to this gentleman who was a Colonel in the Polish Cavalry.

Mr *Murray.*] And it is simply a question of trying to get an indication from your Lordships whether it would be necessary to go through that material in detail.

Chairman.] The Committee would not require you to do that, Mr Murray.

Mr *Murray.*] Well, my Lord, in that event I think I can leave the issue of the heirship and turn, if I may, to the second preliminary Petition which is before my Lords—that was the Petition for leave

to dispense with translation of Latin documents. My Lords, the actual crave of that Petition as framed is at page 115 of the first print, and it is craved to be permitted " to refer in the evidence and in the printed case to the Proceedings in the former claims to the foresaid Marquessate and Earldom of Annandale which were before your Lordships' Committee for Privileges between 1794 and 1881 and to dispense *in hoc statu* with translating these and other charters and documents adduced in support of the Petitioner's claim."

My Lord, very briefly, the position is that much of the documents to which reference *may* be made were documents which have been already brought before this House. Their origin and provenance has been proved before this House on these previous occasions, and it was thought appropriate in these circumstances to ask my Lords to dispense with proof of such materials.

Chairman.] Quite a lot of them prove themselves, do they not?

Mr *Murray.*] Quite a lot in any event prove themselves, my Lord, yes. There is one exception in respect of which I claim my Lords' indulgence and that is that certain documents which are contained in bundle number 2, among the illustrative chapters, are documents which were taken not from the proceedings before this House in the Annandale Peerage claim, but before the proceedings of this House in the Airth Peerage claim. They are photocopies of three pages of the minutes in respect of that particular claim, and taken in 1839 and I would respectfully ask leave that these be dealt with in the same way.

Chairman.] The Airth documents—were they the subject of a claim?

Mr *Murray.*] They were the subject of a claim in the Airth Peerage claim and were considered in that claim. The effect of these documents in relation to that particular Peerage was that they were proved in the same way in that matter as the Annandale documents were proved. They were in fact also referred to in the Annandale case, but we have not photocopied reference in the Annandale minutes. We have photocopied the reference from the Airth minutes.

Chairman.] What are the documents of particular importance to you?

Mr *Murray.*] Those particular documents consist of three documents my Lord. They consist of a draft signature in respect of the Airth Peerage, which is perhaps the best way to put it; a letter by command of the King, Charles II, in respect of that signature, and the Charter which followed thereafter, all of 1680.

Chairman.] There again, the Charter would prove itself?

Mr *Murray.*] Yes.

Chairman.] And you say the draft signature and the letter were before this Committee in the Airth Peerage claim?

Mr *Murray.*] That is so, my Lord.

Chairman.] You need not prove these formally. What else is there of significance?

Mr *Murray.*] The other matters of significance, my Lord, are all matters I think apart from documents which are going to be spoken to in any event which were proved at some stage or other in the course of the Annandale proceedings. There is a list of them as my Lord would appreciate which has been appended to the Petition, and some of those, at any rate, may come to be referred to. Many of them, as my Lord will appreciate, are in fact heirship matters rather than questions of construction of deeds which would tend to prove themselves.

Chairman.] What deeds will you be wanting to found upon in this respect?

Mr *Murray.*] The deeds I will be wanting to found upon are the Warrant of the 23rd April 1662 and the docket attached thereto.

Chairman.] And the original of that was produced——?

Mr *Murray.*] On the 14th May 1844. Perhaps I could refer to the schedule on page 116 of the first volume of print.

Lord *Scarman.*] I think if you gave us the references to the schedules we could then follow.

Mr *Murray.*] I have just been referring to item 1, my Lord.

Lord *Scarman.*] The word "Warrant" is used in item 1 of the schedule. For information, is that the same as Signature?

Mr *Murray.*] Yes, my Lord. If I could explain, and perhaps it is impertinent of me to try to explain but as I understand it the situation was this: the Signature, sometimes called the Signature and sometimes called the Warrant——

Lord *Scarman.*] That is what I thought.

Mr *Murray.*]——is an English language document which consists of an instruction to the relevant officials to prepare the Charter which was a Latin language document. The King superscribed in the appropriate case the Warrant.

Lord *Scarman.*] Does this mean that those who advised the King advised him in English, showed the King what they wanted in English, then threw it over to the Latin scribes to put it into a respectable language?

Mr *Murray.*] That would appear to be the situation.

Lord *Scarman.*] I follow.

Chairman.] Well, I suppose it would probably be the landowner, his legal advisers, who would draw up the Warrant and then they would present it to the Secretary of State, who added this docket explaining to the King what it was all about, and then the King superscribed it and so it went off for the drawing up of a charter in Latin.

Mr *Murray.*] My Lord, broadly speaking that was the procedure. It started with an English language, or a vernacular document at any rate, which was adjusted between the advisers no doubt to the landowner in question, and the officials. It had in fact to be signed by certain Barons of Exchequer and it went to the King with a docket. The docket summarised the main items.

Lord *Scarman.*] The docket is a summary of the claim, is it?

Mr *Murray.*] Yes; the King then accepted what was involved, signed, and that was the instruction upon which the preparation or the completion at any rate of the Latin Charter could proceed. It is a Warrant, because it is a Warrant to prepare.

Lord *Scarman.*] Mr Murray, did the Signature contain a superscription?

Mr *Murray.*] Yes, my Lord.

Lord *Scarman.*] That was sometimes in the King's hand and sometimes in the hands of his advisers?

Chairman.] In certain instances.

Mr *Murray.*] In certain instances. After 1603, when the King was very largely in London, the devices of the cachet was used which was a facsimile largely in London, the device of the I suppose of the Monarch's Signature and that was able to be attached by officials to certain types of documents, indeed, to many types of documents, but for documents of great importance, if I can put it that way, certainly matters relating to peerage as this House has now heard, in order for there to be a valid dealing with a peerage, the Monarch's superscription was required, so that type of document had to go to where ever the King was for his superscription.

Lord *Campbell of Alloway.*] Was the object of this exercise to alter the destination of the land?

Mr *Murray.*] If you mean by that, my Lord, the provision of a document superscribed by the King, it might be to alter the destination of the land. It might be to make a new grant of something which had not previously been granted out. For example, any new Barony not in the sense of a title but in the sense of a Barony as a territorial designation, meaning by that a jurisdiction which was at the time a heritable right, the creation of a Barony of that type required the King's signature and could not be achieved by passing under the cachet——

Lord *Campbell of Alloway.*] Looking at 8(2)D, on page 28, would this be operated unless there were the desire to alter the destination of the land?

Mr *Murray*.] Yes. I think the answer to that was it would be operated in circumstances where it was not merely the destination of the land which was involved.

Chairman.] I suppose if the destination of the land only was in issue, the Barons of Exchequer could have affixed a cachet?

Mr *Murray*. That is right, my Lord. They could deal with destination of land only. My Lord will recall in the *Oxfuird* case, as I understand it, the grounds of decision in that case was that the suggestion of a deed of 1706 might have been valid not only to alter the destination of lands but also to alter the limitations of a peerage grant which was a documents which had not achieved the royal signature but had passed under cachet and which was valid in respect of what it did to the lands, but was not valid in respect of which it purported to do in relation to the peerage, because it was perfectly competent for the Barons by cachet to grant the relevant Warrant for something which altered the destination of land only.

Lord *Scarman*.] Well, that is quite understandable, is it not? Titles of honour were going to be granted by the King and by nobody else.

Mr *Murray*.] Indeed, my Lord. I was referring to the document commencing at page 116 in respect of which I was seeking not to have to lead evidence of proof having regard to the fact that these matters have all been referred to in the previous minutes of the Annandale case.

Chairman.] I do not think we need trouble you in relation to the Warrant of 23rd April 1662, or of the Charter of the same date.

Lord *Scarman*.] Before we leave the Warrant, I think you have made it clear, and I know it is important and that is why I am guilty of perhaps a little repetition, that the Warrant or Signature of 23rd April 1662 bears the superscription of the King himself, does it?

Mr *Murray*.] Himself, indeed.

Chairman.] What about the Act of Ratification. I have not found that in any of the papers, yet. It may be somewhere. Is that of significance?

Mr *Murray*.] I understand we made inquiries and were told that these documents which we listed here did not have to be produced.

Chairman.] If we are going to found upon it we would at least like to have a copy of it. No doubt we could look it up for ourselves somehow, but that is not so easy.

Mr *Murray*.] I will certainly see that copies of that document are made available.

Chairman.] If it is of any materiality, the Committee would appreciate it if you would supply them with copies.

Lord *Brightman*.] If the Act of Ratification were not there, would it matter to you?

Mr *Murray*.] No, it would not matter. What I say is that the Act of Ratification is another adminicle.

Chairman.] If you want us to look at it we must have it before us. If you do not, then it does not matter.

Mr *Murray*.] I think it would be valuable to look at it.

Chairman.] Incidentally, while it is in my mind, and you were talking about the Charter of 1662, I see that the Lord Lyon's Interlocutor which has got the Pedigree next to it refers to a Charter of the 3rd April 1662.

Mr *Murray*.] My Lords, I am informed that must be an error because the Charter on which we are founding is the Charter which was produced to the Lord Advocate.

Chairman.] In the seventh line, you think that is a slip on the Lord Lyon's part, do you?

Mr *Murray*.] Yes, my Lord. There is no Charter of the 3rd April 1662.

Lord *Scarman*.] That is only a three week slip. I think there is a 300 year slip somewhere in these papers—1861—200 years, I apologise.

Chairman.] Very well. What about the following ones, the Letters Patent of 18th March?

Mr *Murray*.] Having regard to your Lordships' decision in relation to heirship, the other matters which are referred to in this list, I am informed, are matters of which the Clerk has in fact got copies, because as I indicated, discussion was had with the Clerk to this Committee last week about the requirements of production in this respect, and I am informed that copies in fact are held by the Clerk.

Chairman.] They are available, are they?

Mr *Murray*.] So I am informed. I trust that is correct. My Lord, the other matters which are referred to in this list are in fact items which with two exceptions (which are the Letters Patent, Items 4 and 5, which I respectfully suggest prove themselves in any event) are all matters related to the heirship and in view of your Lordships' earlier decision I do not think it is necessary to take up time going through this list at the present stage.

Chairman.] No, I do not think it is. What about this translation? What documents are of relevance to your argument which have not been translated, and which we shall require to look at?

Mr *Murray*.] The document which is relevant to my argument, which has not been translated, is the Charter itself of 1662. My Lords, evidence will be led to indicate that the Charter proceeds upon the Warrant and that the Warrant is in fact the English language translation or perhaps it is more accurate to say that the Charter is the Latin translation of the English languagc of the Warrant.

Lord *Scarman*.] Well, this was the point of my earlier question. If there is a discrepancy between the English of the Warrant or Signature, and the Latin of the Charter, which prevails?

Mr *Murray*.] If there were a discrepancy, my Lord, then the answer I think might depend upon the circumstances of the discrepancy. I say that in this sense: that if there was in general terms the Charter is the operative document, and therefore one would expect it in accordance with ordinary rules to prevail. I think, however, if there were a discrepancy in relation for example to matters of the grant or non-grant of a peerage claim, then having regard to the decisions of this House as to the necessity for such matters being brought out in the Warrant as well as the Charter, then if for example there was no reference in the Warrant to a grant of peerage, and the reference only appeared in the Charter, the view of this House I think has been in the past that that would indicate there was no valid grant of a peerage, the reason being I suppose that the Monarch only superscribes the vernacular.

Lord *Scarman*.] That is what I was expecting you to say on that point. One bears the Signature of the Monarch, the other only his Great Seal, no doubt affixed by his officials and not necessarily by him.

Mr *Murray*.] Yes, and indeed in the circumstances of the Scots' conveyancing in the 17th century, the two may be done at long distances apart.

Lord *Brightman*.] Does the docket have any relevance in the event of any conflict of wording, or is that simply regarded as an informal explanation?

Mr *Murray*.] My Lord, there are dicta in one case before your Lordships' House that it is important, if one is determining whether a Charter deals with a peerage that the docket does contain clear reference to it, the reason being that since the Signature itself may be a very long document, the object of the docket was to bring to the Monarch's attention the important matters which were contained in the document, hence if (as in one particular case) the docket was silent as to any titles, then the inference was that there was no valid transaction in respect of the title in that particular instance.

Chairman.] For all practical purposes, the Warrant can be treated as a translation of the Charter when in actual fact the process went the other way round, but one can compare the two and see the sense of it well enough by looking at the Warrant if necessary?

Mr *Murray*.] Yes.

Chairman.] You need a fair knowledge of Latin!

Mr *Murray*.] For that reason, my Lord, I seek to dispense *in hoc statu* with the translation of Latin documents.

Chairman.] Well, we will have to see if anything does turn up which we want to look at which is not clear, but at this stage it does not look as though that is likely to happen.

Mr *Murray.*] I am obliged. I think if I might mention a preliminary matter based on my lack of knowledge of your Lordships' proceedings, I have got a number of witnesses whom I propose to lead in due course. They are all I think present in this room at present. I would think it might in certain cases be helpful to the Committee that they be present.

Chairman.] What is their nature—experts or what?

Mr *Murray.*] There is a genealogist, and two experts in relation to conveyancing and the history of the 17th century.

Chairman.] There is no objection to them being present during your address. When you come to want to lead them you had better tell us what it is they are about to give evidence on, so we can consider the necessity or the desirability of hearing it.

Mr *Murray.*] Yes, indeed.

Lord *Scarman.*] I hope one of them is a Latin scholar!

Mr *Murray.*] I think if assistance is needed, at least one of them should be able to provide it, my Lord.

My Lords, if I may turn now to the matters which I wish to bring directly to your Lordships' attention in regard to this claim, the nature of the case for the Claimant has been set out in the printed documents and at this stage, my Lords, I hope that I can be relatively brief in what I say, because what I would wish to do is give a very brief outline of the matters to which I would wish particularly to direct attention, and then to lead some evidence about that, and then to sum up if I might in regard to that matter. This, as I understand it, is the procedure which has generally been followed. I hope that that meets with your Lordships' approval as a method of proceeding.

Chairman.] Very well.

Mr *Murray.*] My Lords, as has already been made clear to your Lordships the case for the Claimant is that the Charter of 1662 was a good deed in all its parts, and that amongst other things it conferred the title and dignity of Earl upon James, the first Earl of Annandale and Hartfell. James, the first Earl of Annandale and Hartfell, was in 1661 the only surviving son of his father who had been the first Earl of Hartfell and he had received by Patent of 1661 the title of Earl of Annandale, Viscount Annan and certain subsidiary titles.

Chairman.] Do you want us to look at the Patent?

Mr *Murray.*] Not at this stage, my Lord. I am simply trying to indicate the position. The deed in 1661 was a Patent only, that is to say, it dealt solely with a title of honour. In 1662, the deed on which I have found deals with several matters. It deals with all, or perhaps not all but all that we know at any rate, of the lands which were owned by the Earl. It brought them together into a single Earldom which is a creation of an heritable asset which had not previously existed.

Chairman.] Well, now, this is a territorial Earldom.

Mr *Murray.*] Indeed, and as my Lord is aware a territorial Earldom as such by itself is an heritable, or was in those days, right which had certain valuable powers, for example, as I understand it, it had the power to levy fines within the area of the Earldom and to retain the fines which were levied. It was not, however, by the stage of 17th century, a peerage dignity. The erection of lands into a territorial Earldom like the erection of lands into a territorial barony was not the creation of a title. In order to achieve that other language had to be used indicative that what was involved was the grant of a peerage dignity as well

Now, my first submission relating to the conveyancing aspects of this matter is that it is clear that in the 17th century, Charters were deeds which were commonly used in Scotland to create dignities. That includes Charters which dealt also with the lands, because Charters had many other purposes.

Secondly, where the grant of a peerage dignity was involved in relation to a

Charter or in any other way, it was of the essence that it be conferred by the Monarch. That meant that the personal signature of the King was required. I have already indicated to your Lordships, not in respect of the Charter itself but in respect of the Warrant which was the English language document upon which the Charter proceeded, I accept the law as laid down in this House shows clearly that for there to be an effective grant by the Monarch of a peerage dignity by Crown Charter, there had to be a statement in the Charter itself, there had to be a statement in the Warrant itself, and there had to be reference in the docket which was annexed to the Warrant as to that matter.

Lord *Brightman*.] You mean that a dignity was being created?

Mr *Murray*.] Yes.

Chairman.] Well, you have got mention of the dignity in all these three documents, but in a slightly oblique way. That is the problem, is it not?

Mr *Murray*.] My Lord, the second point perhaps, and this is a matter on which I propose to lead evidence, is that the slightly oblique way is the use of the phrase in the Latin "*cum titulo . . .*" etc., and it would be my proposal to lead evidence to show that grants were made of dignities and other important things by use of the word "*cum*". Obviously that could only be done if another thing was being granted as well, but in my respectful submission——

Chairman.] Well, you may be able to produce quite a lot of Charters and indeed Warrants in similar terms. Does that help you to show that these other Charters did actually create the dignity?

Mr *Murray*.] In my respectful submission it does, my Lord, if one can show that Charters upon which titles of honour or other rights have proceeded upon that basis. Then in my respectful submission that helps to show—

Chairman.] Is it a matter of law or a matter of fact? Or a mixture?

Mr *Murray*.] There have been decisions in relation to other heritable rights where as a matter of law the use of the word "*cum*" is sufficient to confer the grant of that which is being granted in that part of the deed which uses the phrase "*cum*".

Chairman.] Has the matter been considered as a question and decided in your favour in any case or proceeding?

Mr *Murray*.] In relation to a peerage claim it has been, if I can put it this way, accepted as having advanced on that basis in certain proceedings. There is certainly a dictum to which I will refer in due course, if I may, by a Lord Chancellor who said that the grant of the peerage dignity as opposed to the grant of the territorial Earldom was conferred by the words "*cum titulo stylo et dignitate comitis . . .*".

Lord *Scarman*.] It would help me if we just looked for a moment at the structure of the document which ultimately we have to construe, that is the structure of the Warrant or Signature. Which would you prefer to call it — a Warrant or a Signature? For myself, I want to follow your lead hereafter.

Mr *Murray*.] I think I have been more normally calling it a Signature.

Lord *Scarman*.] Right. I think Signature is more correct. I am pleased to hear you say that. We will call it Signature. I am looking at the Signature which is contained in the volume of proofs, Addendum Annandale Warrant and Annandale Charter. That is a print really taken from the Minutes of this House of 14th May 1844, is that correct?

Mr *Murray*.] Yes.

Lord *Scarman*.] Now, it is signed by the King, at the bottom of page 94, is it?

Mr *Murray*.] That is right, my Lord.

Lord *Scarman*.] It is then "Our soveraigne lord . . .", and you can forget all the rest of the words on that page, and turn over to the top of page 95, and this is the important bit, "ordains aue charter . . . under his Majesties great seale . . . grant . . . to . . . James earl of Annandaill . . ." and then the destinations are set out on this Deed. We have pages of those — first destination, heirs male, lawfully begotten of the body, second destination, heirs fc-

male, third destination, heirs male lawfully of the body of the eldest female heir and finally his nearest heirs. After that pages and pages of the lands. It makes one's mouth water, Mr Murray, when one sees what they had in terms of land!

Lord *Beswick.*] Is this the document which is supposed to be in English?

Lord *Scarman.*] This is all in English.

Chairman.] You can call it Scots at this time, I think, 1662.

Lord *Scarman.*] Scots-English or English-Scots, I do not know which is more complimentary to the Scots, whichever it is you would want.

I am doing this because I think it will shorten the proceedings; if we just see what it is we have to consider. Bottom of page 94: "Our soveraigne lord", superscribed by the King, "ordaines aue charter", top of 95, to be expedited under the Great Seal to grant to James, Earl of Annandale and Hartfell, then the limitations or destinations are set out, and after that pages and pages of lands in Dumfriesshire and else where with all sorts of rights in Moffat and so forth; it goes on for pages. Then goodwill of patronage is disposed of. Then some services required. Then one comes I think to a page where the title of honour is granted.

Chairman.] I think it is worthwhile noting page 101, which contains the resignation of the lands.

Mr *Murray.*] Would it be helpful——

Lord *Scarman.*] I wanted to say — ordains a charter, grants lands and all sorts of things, resignation of the lands and then the words on page 102 —

Chairman.] I think it is worth noticing, before we go further, that this is a grant of *novodamus* that is to say all the lands and so forth had been surrendered for a new grant. The new grant was no doubt for a different series of destinations than those upon which these lands had been held previously. I have not had the opportunity to look at the previous grant but presumably this was a new destination, ". . to the heirs male of his body whom failing to the heirs female of his body and the other heirs . . ." and so on.

I think it is fair to say that certainly you could not have a charter of *novodamus* unless lands had been resigned into the hands of the King.

Mr *Murray.*] I intend to lead some evidence in that respect.

Lord *Campbell of Alloway.*] There is a grant in 1643 and another one later and this was a re-grant, so to speak, a surrender and a re-grant of lands altering the destination from the first set of limitations under the old Patents. Am I wrong on that?

Mr *Murray.*] This dealt with lands. My Lord has referred to 1643 and it is simply a Patent of a peerage dignity, the earldom of Hartfell; it did not relate to lands at all.

Chairman.] However, the fact is that these lands had been granted out by the King on some previous occasion and probably destined to a different series of heirs.

Mr *Murray.*] If I may go to the foot of page 100, beginning with the word "attour", which means "moreover", my Lord will see he ratifies and confirms a charter of sale by Sir John Amisfield, so there were lands which had been brought into the ownership of the Johnstone family by the sale by Sir John Charters, and there are other references to certain other sales or acquisitions half way down page 101.

My Lord is quite correct, in what in firm conveyancing terms would be called a *quaequidem,* this is a simple history of what has been resigned, and it refers to these territorial matters.

Then at the top of page 102 we have the charter of *novodamus* clause and my Lord can see in English in the fourth line it says "off new hes given granted and disponed". My Lords will see it is there described under the same destination as we have seen in the first disposition clause to which my lord, Lord Scarman, drew attention; a shorter reference to the land.

It goes on, slightly more than half way down that page, and proceeds at that point to "...makes units..."——

Lord *Campbell of Alloway.*] Where are we?

Mr *Murray*.] Fifteenth line from the foot of page 102.

Lord *Scarman*.] Is this starting the territorial earldom?

Mr *Murray*.] Then it creates a territorial earldom. There had not been any territorial earldom before this stage. The first part of the matter is the grant of a territorial earldom, using the words "makes units creats ... erects and incorporat all and sundrie the lands..." et cetera, "... in ane haill and frie barronrie lordship and earldom regalitie justiciarie with free chappell and chancellarie within the heall bounds meithes and merches thereof to the said James earl of Annandaill and Hartfell his heirs and assignayes foresaids". That is the same destination as has been completed in relation to the lands themselves further up. So that the destination is now being repeated in respect of the grant which is a new grant, not a grant of something which the earl already had; something quite new.

Chairman.] He is making all these lands into a territorial earldom?

Mr *Murray*.] It is not a right which the earl had had before.

Lord *Campbell of Alloway*.] Did it not include lands he already had? How do we know this?

Mr *Murray*.] There will be evidence from those better qualified than I to explain these matters, but the first part of his clause of *novodamus* deals simply and solely with the lands themselves. The remaining parts of this clause of *novodamus,* and there are several, deal with the confirmation of new rights which did not exist before. The lands had been owned by the earl before, they were surrendered for re-grant. The destination under which these lands were to be held is that stated at the top and there then follows the making of this into a territorial earldom, as I have already explained, establishing it as a new right, a heritable right which did not exist before, and that is granted to the same man and the same set of destinations, because it is to him, "his heirs and assignayes foresaids."

Lord *Templeman*.] Is this right that prior to this there had been a grant of certain territories which had certain limitations which we do not know, which were granted upon them as being absolute interests entail, or male or female entail interests. In addition there were other territories which had been acquired by purchase and presumably if they were acquired by purchase they should have been absolute interests to whoever purchased them and passed under the will As I understand it, what this did was to wrap up together everything which the earl had, either because they had descended to him in mere entail form, which we know nothing about, or because he had acquired them under certain sales. It wrapped them all up, drew a line around the lot and said, "That is where your territorial earldom is to be". Is that right or wrong?

Mr *Murray*.] That is joining two matters. What it did first of all was put them altogether as if they were under one destination, the land and the rights which previously existed. What was then done was to take those same lands and create a new right, which had not existed before, which is the territorial right of earldom, which nobody had had or enjoyed before, and which the King then created in favour of this man with the same destination as he had already granted in respect of the lands themselves.

Lord *Templeman*.] It is my ignorance but up until then, although he held the lands, some as entail heritable, some under will and some purchased, he did not have any jurisdiction—he could not fine anybody, he had no court. This takes all the land, creates a new destination as regards the title to those lands. If he held any absolutely they would become entailed into those. It wraps them all up in the same system of descent and it adds to them, so far as you say, the territorial earldom which gives him rights of jurisdiction and rights to fine. Is that right?

Mr *Murray*.] That is right, my Lord.

Chairman.] Before this James, the first earl, had all these lands under a title, he had also got under the Letters Patent of 1661 the earldom of Annandale and Hartfell, is that right?

Mr *Murray*.] That is right.

Chairman.] What he had not got was any territorial earldom and this is what the Charter proceeded on, turning all his lands into a territorial earldom which was his property?

Mr *Murray.*] And that was a new——

Chairman.] He did not have that before?

Mr *Murray.*] He did not have that before.

Lord *Campbell of Alloway.*] How can the territorial earldom exist without the territory in those circumstances?

Mr *Murray.*] It was an addition, not everybody who had a stretch of territory had a territorial earldom. In order to enjoy these particular rights they had to be specially granted. Before 1662 the earl of Annandale had, by reason of the creation of the previous year and by reason of the Hartfell creation, the dignity of the earl, the peerage dignity, but he did not have the territorial earldom with the rights of that confirmed.

Chairman.] You say an individual could have the title and dignity of earl without having a territorial earldom?

Mr *Murray.*] Yes.

Chairman.] That was the position of James before this Charter?

Mr *Murray.*] That was the position of James before this Charter.

Lord *Templeman.*] Would that be unusual? If you get a grant of a peerage you usually get simultaneously, or fairly soon after, some title of territorial earldom to go with it?

Mr *Murray.*] Not always, my Lord.

Lord *Templeman.*] Is it unusual to have them separate?

Mr *Murray.*] Originally it is thought that the earldom was purely a personal dignity—and I am going a very long way back—that was followed by a period in which it became a territorial dignity only, that is if you bought the land you bought such title as there was that went with it. Certainly by the sixteenth century two separate situations had arisen, one was the territorial earldom with the particular powers which it had, the other was the peerage dignity which was related solely to the person and might descend (and frequently did descend) in different ways.

Lord *Scarman.*] A King has just won a battle, he immediately rewards someone who has behaved immensely gallantly at that battle; "I give you the earldom of Annandale". He does not give any lands at that stage, it is an earldom, a title of honour for outstanding service on the field. Later the earl may acquire land by purchase or inheritance, or the King may wish to give him land and back up that title of honour with some royal bounty. Immediately then comes into existence the territorial earldom if the King chooses to give him the Patents we see confirmed here. Of course, it may be the other way around.

Mr *Murray.*] It may indeed.

Lord *Scarman.*] One sees they are quite independent and yet can be, for purposes of honour, dignity and wealth, adhering together in one person?

Mr *Murray.*] They may have come together in separate ways, they may depart from each other again in separate ways. That is the stage which has been reached certainly in the sixteenth and seventeenth centuries.

The present deed goes on, having referred to the creation of the earldom, by which I mean the territorial earldom, to refer to it being called "in all tyme comeing the earldome of Annandaill and Hartfell . . . with the title styll and dignitie of ane earl according to the date of the said James earl of Annandaill and Hartfell and his said deceast ffather . . ."—

Lord *Templeman.*] Where are you reading from?

Mr *Murray.*] Page 102, about 10 lines from the bottom.

Lord *Scarman.*] I did not hear what you were saying. Are you reading the description of the territorial earldom?

Mr *Murray.*] I had stopped before the words "his heirs and assignayes" which shows it is being descended to the same set of heirs as the lands themselves. It goes on to say: ". . . called and to be called in all tyme comeing the earldome of Annandaill and Hartfell . . ." and then the words, "with the title styll and

dignitie of ane earl according to the date of the said James earl of Annandaill and Hartfell and his deceast ffather their patents granted to them . . . " . My contention is that those words in the circumstances operate as a grant of a peerage dignity.

Lord *Scarman.*] You will be explaining to us in due course what the words " according to the date of the said patents granted to them " means?

Mr *Murray.*] Yes, my Lord. I shall be endeavouring to do so.

Lord *Scarman.*] I find those words difficult. I just give you that warning.

Lord *Brightman.*] Do you understand the words which follow " title styll and dignitie " to be merely a reference to the prior creation of the earldom?

Mr *Murray.*] My respectful submission is that would not be a proper contention.

Lord *Brightman.*] Do you understand that to be the argument?

Mr *Murray.*] I assume that is the argument against me.

Chairman.] There is not a particular contradiction, is there? It is one of the views which might be expressed against your argument which you will obviously have to deal with and put out of the way, if you can?

Mr *Murray.*] Indeed. What I say is that those words are prefectly appropriate really to the conferring of a new peerage dignity upon this individual and without——

Lord *Templeman.*] You just told me they are separate, or could be separate. This is a style of dignity with the land, so it was part of the land and not a new peerage or anything of the sort. It was something which describes the grant which has been made of the land. If you are right (and I am speaking as devil's advocate) you would expect paragraph one to deal with all the territorial dignity, paragraph two would start off an entirely new grant, something entirely different not necessarily in connection with land, namely a peerage. Here you have got it tagged on to bodies and patents of this and that and surrendering and giving, and amongst the question of how you hold the land you find squeezed in at the end of page 102 where he is given something of very great historical value, which some people would give their eyes for then and ever since, a peerage and an earldom. This is the argument against you.

Mr *Murray.*] That would be part of the argument against me. What I say is that I would submit the grant of a territorial earldom does not involve the grant of a title and dignity. These words would not have meaning in relation to the grant of a territorial earldom alone, and these words must mean the confirmation of a peerage dignity, the more so having regard to the reference to the " according to the date and the patents " of the two persons mentioned. I will try and develop that later.

Chairman.] You say that here is the King granting anew all these lands to James, and he is putting all these lands into a territorial earldom. James already was the earl of Annandale and Hartfell under the Patent of 1661 and there was no need to say anything about it.

Mr *Murray.*] I can go further than that, because the King did not read these patents——

Lord *Templeman.*] You first of all tag it on to land and then you say he has the peerage already. You tag it on to the end and you take the peerage and renew it through a different channel.

Lord *Campbell of Alloway.*] There is a reference to " patents ", plural. Reading the papers there are three patents, is that right? There is 1633, 1643, 1661.

Mr *Murray.*] Yes.

Lord *Campbell of Alloway.*] What is the reasoning or justification for referring to patents, plural, after a *novodamus* clause? How do you put it? What conclusion do you draw from that?

Mr *Murray.*] In my respectful submission the conclusion one draws is that this was a new grant because the reference to the dates of the early patents will only be relevant in the context this is a new grant which is under consideration.

Lord *Campbell of Alloway.*] If it is a new grant and it is only a new grant of a dignity as distinct from lands and they

are disjointed and not conjointed, why does one have to go through this rigmarole?

Mr *Murray*.] Because the deed is performing more than one function. The deed is performing the double function of dealing with the lands and conferring of several new rights upon the individual concerned. This is dealing with the new rights of a grant of territorial earldom which we have already looked at. It is dealing with the new right of a grant of peerage, and it is dealing with the further new right in respect of grants of market in relation to the Burgh of Moffat.

Lord *Scarman*.] Is this not the point which was indicated to you a moment ago by my noble lord in the chair? We are interpreting the royal will from the words of the sovereign, and it is therefore the same exercise as interpreting a statute. One has to look at the surrounding circumstances and my learned friend in the chair reminded you—and I think it is a very important reminder—that the man who was the patentee was already the Earl of Annandale.

The Earl of Annandale was troubled by succession problems and the real problem that was being tackled by the King, and no doubt with the approval of the Earl of Annandale, was to alter the destination of that peerage as well as incorporate all the lands in a territorial earldom. It was done in one instrument. Of course, the territorial earldom occupies pages and pages; an enormous amount of detail, in the words of Lord Campbell, rolled up into the territorial earldom, and then the jurisdiction and franchise and so on had to be granted. When one came to the title of honour nobody wanted to get rid of the Earl of Annandale but all wanted to get rid of the destination and it was done by that Charter and this Charter itself is introduced by the words "with the title" or in the Latin, "*cum titulo*".

If you look at the surrounding circumstances it is natural that they would want to do something about the destination and the title of honour.

Mr *Murray*.] I am obliged, my Lord. What the monarch had his eye directed to was the docket which one must look at in construing this. The docket is on page 111 and it is a much shorter document and my Lord will see that it is an explanation to the monarch of what he is being asked to superscribe. It says: "These contain yo' Maties gift and disposition to James earle of Annandale & Hartfell and to his heirs and assignes of the lands lordships tenendries and others particularly therein contained with teindes personage and vicarage and rights of patronages of churches and yo' Maties confirmation of a charter of alienation by Sir John Charters to the deceased James earle of Hartfell of severall lands therein contained all the lands lŏps baronyes and others were resigned for new infeftment with a right to all bypast maills and fiermes by reason of word of otherwise with a supplementum of all faults . . . " and then the words, " . . . united in a free barony lŏp and earledome regality justiciary with frie chappell and chancellary to be called the earledom of Annandale & Hartfell and lordship of Johnstoun with the dignity of an earle according to the date of James earle of Annandaill & Hartfell and his deceased father their patents . . . " and then it goes on to other matters.

Your Lordships will see in the much abbreviated version of what this deed is really about the words "with the dignity of ane earle according to the date . . . " and certain patents, and that is reiterated, so it is pretty clear to the monarch that this is what is involved, or one of the items involved.

Lord *Brightman*.] You will be addressing us later on the exact significance of "according to the date" and "their patents"?

Mr *Murray*.] Yes, indeed, my Lord. That is a technical matter.

Lord *Aberdare*.] If one of the main points of the Charter, as Lord Scarman has said, was to alter the destination because the earl was worried about his succession, why did not this appear in the docket? Is that not such an important matter?

Mr *Murray*.] The docket refers to "and to his heirs and assignes".

Chairman.] It does not say anything about heirs, about the destination of the heir female. Lord Scarman has said that according to the material collected by Mr Peskett, it was something that

James, earl of Annandale was worried about, succession, becouse he had got nothing but daughters and an infant son who had just died and so forth, but assuming he did not wish his estate to go off to some very remote kinsman and he wanted his daughters to be provided for, the lands were the important thing, and the lands, if they were to be kept in the female line, would be available for making provisions for his daughters and their descendants which would otherwise be lost. It does not necessarily follow that his concern for his daughters was associated with the desire to keep the earldom in the immediate line of descent and so to include females.

Mr *Murray*.] There is certain evidence which does bear on that matter, which suggests he had that desire as well as any desire related directly to the lands themselves.

I am reminded that at that particular time, and indeed up until 1707, it was very common for people to resign earldoms and obtain fresh grants upon a new series of heirs, precisely to keep within their own immediate family titles of honour.

Chairman.] Would you think it was a matter of concern to the King what destination a title of dignity was going to follow? Would one not expect that if the destination of an existing earl was being altered or a new one was being created that the same style and title would follow a different line of descent and that the King would have that brought to his notice? As my noble lord, Lord Campbell has said, there is nothing there to tell the King about this important matter, namely that this earldom is not going to go off possibly through the females.

Mr *Murray*.] The answer I make to that is that the reference to "heirs and assignes" is entirely general.

Lord *Templeman*.] Can we look at what it says? You read page 102 to the bottom and then you have the words, and these are the only words you rely on, "title styll and dignitie of ane earl", and then it goes on, ". . . ordaining the toure and fotalice of Johnstoun . . ."— the major is all mixed up with the minor. What was the point of saying "your principal castle should be this"? What does it then go on to say? Does it continue with land or go back?

Mr *Murray*.] It deals with both.

Lord *Templeman*.] My eye has only just been caught by the reference to the tower and fortress. What does it do after that?

Mr *Murray*.] It ordains it to be ". . . the principal messuage of the said barronrie lordship and earldome." You have to fix the principal place and that is what it is doing.

Later on, on page 103——

Lord *Templeman*.] Before you get there, I am an Englishman and I do not understand any of this. What does it do at the bottom, ". . . wills and grants . . . that ane saising now . . ."?

Mr *Murray*.] "Saising" was required in order to establish the right of——

Lord *Templeman*.] We are still dealing with land?

Mr *Murray*.] No, heritable rights.

Lord *Templeman*.] Territory?

Mr *Murray*.] No, heritable rights, because a peerage is the one heritable right.

Lord *Templeman*.] What does it say? I am interested to know what all this does. It goes on to say: "be ane sufficient saising"?

Mr *Murray*.] That will be the principal place.

Lord *Templeman*.] In other words going along and getting a bit of sod and that is a token of him having the territorial grant. What does it do next?

Mr *Murray*.] What it next does with the words, "and ffarder", is a further and separate grant which relates to the burgh of Moffat and that is erected into a free burgh and there are provisions whereby a right of market is conferred upon it.

Lord *Templeman*.] What is "brugh and toune be provydit"?

Mr *Murray*.] That the burgh and town be provided. It means that it is necessary for one town and burgh to

be provided and erected within a particular place where it is most convenient and that place is to be Moffat.

Lord *Scarman.*] The docket is very helpful and shows what the Charter was intended to do. Even today the docket is helpful. You can see that after the reference to title, style and dignity of an earldom there are arrangements for the exercise of power, financial services, governor of some castles, services and so forth ; they are all in this document. The strange thing is that in the middle of it all are the words title of honour.

Mr *Murray.*] No, it is in the normal place, as I trust evidence will be led. It is the normal place.

Lord *Scarman.*] I did not think you would run away from it, but that is the way it is done.

Lord *Brightman.*] What do you mean by " normal place "?

Mr *Murray.*] The structure of this Charter is normal in the sense that there were particular aspects of a Charter which were followed through and certain parts of it occur at particular points. Where you had fresh grants of anything which was a heritable right then the normal place for putting these was in the clause of *novodamus* which would also contain the re-granting of that which had already been held.

Lord *Brightman.*] Where does the *novodamus* clause end?

Mr *Murray.*] It ends at the reference to—

Lord *Campbell of Alloway.*] It ends with the land section, because you cannot have a *novodamus* of a title. *Novodamus* is related to a concept of an original grant and a re-grant.

Mr *Murray.*] It has two functions, my Lord. There is the re-grant of that originally granted, there is also separately a grant *de novo* in the sense of something which is newly granted, meaning for the first time.

Lord *Campbell of Alloway.*] Quite apart from any land?

Mr *Murray.*] It may be land or other heritable rights involved in that second use of the *novodamus.*

Lord *Campbell of Alloway.*] You cannot have a *novodamus* just with land, can you? The concept of grant and re-grant is the essence of *novodamus* and that does not arise in a title pure and simple, does it?

Mr *Murray.*] It could be under the Scots peerage law because you could resign for a re-grant.

Chairman.] That is one of the curious things about this Charter, although James, Earl of Annandale could have resigned his earldom, his title and dignity of earl, given him by the Letters Patent of 1661 with a view to it being destined to a new series of heirs, he did not do that?

Mr *Murray.*] I have to proceed on the basis he did not do so.

Chairman.] He had to resign all his lands to a different series of heirs, but so his daughters would not suffer financially he did not resign his earldom.

Mr *Murray.*] I think there may be reasons for that, having regard to the history of the matter. My Lord will appreciate that these matters come in 1661-62 which follows in effect an interregnum of approximately ten years, having regard to the activities of the Cromwellian regime.

Chairman.] He did not become the Earl of Annandale until 1661?

Mr *Murray.*] That is true, my Lord.

Lord *Templeman.*] If that is right everyone knew from the beginning. Here was an earl saying, " What about my four daughters " and somehow it gets forgotten until 1661. There were several times when it could have been said, " This is really what we are doing, no sex discrimination for our daughters."

Mr *Murray.*] The argument in respect of the Patents of 1661 proceeded precisely upon the basis that the proper construction to be given to the words *haeredibus masculis* there was a limited construction which would enable the second destination in that Patent to come about. That matter was argued twice before your Lordships' House in the nineteenth century when it was held that the words meant heirs male whomsoever, that on the extinction of the heirs

male of the body the matter proceeded upwards until the heirs male whomsoever were extinct before heirs female could continue, which was practically impossible to prove. The matter proceeded on that basis. This is not the case, however, that the particular deed was forgotten in that sense.

Lord *Scarman.*] I may be under a misapprehension but in this context it seems to me that some words here—and I may have it completely wrong—refer to the 1661 earldom and are an indication that really that earldom is being recognised.

Now I say, like my noble lord on my right, that I am an Englishman and I have never looked at documents of this sort before and I cannot understand them, but the words on which you rely are on page 102 where you discover "according to the dates of the said James, earl of Annandale and Hartfell and his said deceased father their Patents granted to them." Those words qualify what you describe as the peerage dignity. They seem to be a reference to the peerage dignity created in 1661, and it looks as though we are creating this territorial earldom so that he could make provision for his daughters, but we are recognising, without alteration, the title of honour granted last year in 1661. If so, that is the end of the argument. That is why those words trouble me. I have looked at the Latin and it is, "*secundum datas diplomatum.*"

Mr *Murray.*] What I say is that in fact they are not a trouble to me but they are helpful to me because the words "*cum titulo stylo et dignitate*" are words which are proper for the creation of a peerage dignity. You then have the question here is a man who already holds a peerage dignity, so what is to be the effect on him of a grant to him of another.

Chairman.] We have distracted you from your intended line of argument but at least it has indicated to you one or two problems which their Lordships will need to be satisfied about.

We will resume at 2 o'clock.

After a short adjournment

Chairman.] Mr Murray?

Mr *Murray.*] My Lord, I think that when we rose just at lunchtime I had been asked certain questions in relation in particular to the phrase which is contained in the Docket and in the Signature, in some such words—because they are not quite the same—as "according to the date of James earle of Annandale & Hartfell & his deceased father their patents". This is undoubtedly my fault. I had, I think, failed to point out to your Lordships that what this is is a clause of precedence. It is *not* saying a dignity of an earldom according to the patents, it is according to the date of their patents. The point about that, my lords, in summary at this stage, is that precedency has no significance whatever in relation to a territorial earldom. A territorial earl has no dignity therewith or any precedence therewith. It *has* significance in any case which involves the grant or possibly the re-grant of a peerage dignity, because the question which may arise, or *a* question which may arise, is: "Where do you stand then in the roll of peers of that rank? ".

As I think the Acts of the Parliament of Scotland show, the particular matter of precedence was a matter on which there was a certain amount of contention between their Lordships at the sittings in Parliament. The precedence in Parliament was, of course, only of significance in Parliament to a holder in title of honour. There are really only two possibilities in any case which involves the grant of a peerage dignity. One is that the precedence is simply to be the date of the grant: the other is that some earlier date will be fixed by the Crown, in making that grant. It is fairly common practice, or appears to have been fairly common practice, for the Crown in fact to fix dates for precedence which are different from, and earlier than, the date of the grant of the particular peerage dignity with which the monarch was immediately dealing. I would contend that some evidence will be led about that at a later stage.

Lord *Brightman.*] On that basis, supposing that A was the Earl of Annandale under an earlier creation, and B was the Earl of Annandale under a later creation; then they rank equally, is that not right?

Mr *Murray.*] They rank equally if the dignities are held by the same person. If there comes to be a separation——

Lord *Brightman.*] I am assuming there was a separation.

Mr *Murray.*] If there comes to be a separation, then the holder of the title of the grant which is first in date would rank immediately in front of the other. Perhaps I may give a reference to this particular case. Since this deed purports to confer precedence according to the date of James Earl of Annandale and Hartfell and his deceased father their patents, his deceased father and patents (which is the patent of Hartfell only) is 1643. So the year 1643, in the Scotland peerage creations, would be the year for the purposes of the precedence of the Earl of Annandale and Hartfell. If there came to be dignities by separation, because two dignities came to be held by two different persons, then both would still rank as 1643 creations, but the one holding by virtue of the earlier title would rank immediately in front of the other; but both would rank in front of creations of later years, unless, of course, the monarch in creations of later years chose—as he did, indeed, in some cases—to make the precedence of some later creation backdated to some earlier date.

Lord *Brightman.*] Is your argument this: that if this is merely a reference back, and nothing more, to the first creation, there would have been no purpose whatever in saying "according to the date", etcetera?

Mr *Murray.*] Exactly, my Lord. It makes no sense at all, in my submission, unless one treats it as a proper clause of precedence.

Lord *Scarman.*] So you rely upon these words as indicating the creation of a new title?

Mr *Murray.*] Indeed, my Lord. I quite accept that if it had said *secundum patentis,* then the argument which I think my Lord Scarman was putting to me this morning might have had force. However, it is because it is *secundum datas* that, in my submission——

Chairman.] You said there would be no need for a backdating, unless there was a new grant?

Mr *Murray.*] Exactly, my Lord. It has no meaning at all, unless, in my respectful submission, there is a new grant. I would seek, at the end of the day, to found fairly heavily on this particular point as demonstrating that a new grant was in fact what was being done in 1664.

Lord *Scarman.*] Of course, your other point or submission, with respect, which seems to be a very strong one, is that date has no relevance at all to a territorial earldom?

Mr *Murray.*] Indeed.

Lord *Scarman.*] It is very relevant to a title of honour, and it is indication, therefore, that these words which the phrase qualifies *are* the grant of a title of honour?

Mr *Murray.*] Indeed, my Lord.

Chairman.] Supposing the King created two quite separate peerages on the same date; how would you determine the precedence between them?

Mr *Murray.*] My Lord, Sir George Mackenzie, who published, I think, in 1680, has 1½ pages on that matter! Broadly speaking it relates like other deeds, like other heritable grants. First priority in date only, he tends to say. Since they are of the same time, you have to ask the monarch first if he remembers in which order he signed the signatures. If he does not remember, you must let him decide which he signed first, rather than let other people prove it, because it must be in his discretion. However, the broad rule appears to be date of signing, only at least if the monarch is still alive then he will be the sole witness or sole adequate evidence as to which was first granted.

Chairman.] If he is not still alive, it is the monarch of the day?

Mr *Murray.*] No, it then appears to relate to the deeds. I suppose that by that stage it would be known in which order the two of them sat in Parliament, and perhaps from that the interpretation would be derived. However, I was proposing to come to that in detail in my final submission.

My Lords, the other matter which I should pick up at this stage was the reference in the Docket to "heirs & assignes". The point which I want to make there is a very simple one, and it is this. "Heirs & assignes" by Scots law would mean heirs of whatever sex and assignes. Therefore, the monarch

would be aware, from a consideration of the Docket, that what he was granting were territorial earldoms, peerage dignities and the rest, in my contention, which would go to both males and females. There is no need to put in *in extenso* the destination which said first males, then females; it was enough to say "heirs", because that in Scots law would have meant both males and females would take in such a situation.

Chairman.] You assume His Majesty King Charles II was sufficiently instructed in the law of Scotland to be aware of that, do you?

Mr *Murray.*] Perhaps Lord Lauderdale thought so, since he signed the Docket, my Lord.

Lord *Scarman.*] A Stuart king should perhaps have known, having regard to his own succession.

Chairman.] He did not spend much time in Scotland at any stage of his life.

Lord *Brightman.*] "Heirs & assignes" simply means "heirs general", is that so? No, it does not mean "heirs general", obviously, in this case.

Mr *Murray.*] No, it means the heirs who would succeed according to the general law.

Lord *Brightman.*] It seems such a careless word—"assignes".

Mr *Murray.*] Yes, my Lord. My Lord will appreciate that under this deed, as is very common in those circumstances, failing your own heirs, you could assign.

Lord *Campbell of Alloway.*] Without the assent of the monarch?

Mr *Murray.*] But it had to be with the assent of the monarch.

Lord *Campbell of Alloway.*] With the assent of the monarch always on a resignation.

Mr *Murray.*] Still the word is frequently used, though.

Lord *Brightman.*] How do you deal with the point that the Docket does not explain one of the most important things which one would think the monarch would need to know, which is that this dignity was to have a destination of females as well as males?

Mr *Murray.*] Because the word "heirs" by itself would suffice for that purpose.

Lord *Brightman.*] So "heirs" by itself would mean "heirs general", which, of course, is not the case here.

Mr *Murray.*] But "heirs general" is male and female.

Lord *Templeman.*] It is ambiguous, surely, is it not?

Mr *Murray.*] My Lord, this is a summary matter. These words apply to all the destinations.

Lord *Templeman.*] If you say it is a summary matter, you ought to read it. You must understand, I do not understand Scots and like an English witness in a Scots court, I need an interpreter for the judge! Will you tell me what the Docket does say, and what it is that these chaps thought it important that the King should know? They obviously thought it was unimportant that he should know how the earldom should descend, because they used the words "heirs & assignes", and "assignes" is appropriate, but "heirs" is ambiguous. What does it say? It says: "These containe" your Majesty's "gift and disposition . . . of the land". Will you go on from there?

Mr *Murray.*] I should inform my Lord that in peerage dignities in Scots law the word "assignes" was very common.

Lord *Brightman.*] As meaning what?

Mr *Murray.*] As meaning "assignee" or "potential assignee".

Lord *Templeman.*] That is absurd.

Mr *Murray.*] My Lord, that was the position in grants of peerage dignities in the 17th Century in Scotland.

Lord *Templeman.*] Then it does not faithfully tell His Majesty what was actually in the Warrant.

Mr *Murray.*] But the Warrant includes the written words.

Lord *Campbell of Alloway.*] Surely that is beside the point, because you cannot get its meaning unless you get

the sense of the words. It must be beside the point, is that not right?

Mr *Murray*.] In this very deed one ends up with " assignes ".

Lord *Templeman*.] One ends up with that, but I would like you to go through the Docket and tell us what it tells His Majesty.

Mr *Murray*.] What it says is that it grants to James and to his heirs and assignes, then there are specified certain lands. I say " there are specified ". It says: " the lands lordships tenendries and others particularly therein contained with teindes personage and viccarage and rights of patronages of chaurches ".

Lord *Templeman*.] Then " confirmation of a charter ".

Mr *Murray*.] Yes, confirmation of a charter by Sir John Charters, together with all the lands and so on which were then resigned with a right to certain bypast rents.

Lord *Templeman*.] What are " maills & ffermes "?

Mr *Murray*.] They are " rents ", in effect. Then it goes on: " by reason of ward or otherwise "—that simply means with landholding of tenants—" with a supplementum of all faults united in a free barony ".

Lord *Templeman*.] What is " supplementum of all faults "?

Lord *Brightman*.] It does not seem to read correctly: your Majesty's " gift and disposition to James . . . and to his heirs & assignes of the lands " and so forth " were resigned ". How do you read it?

Chairman.] I think there is a full-stop after " contained ".

Mr *Murray*.] There is either a full-stop, or the word " which " is omitted.

Lord *Brightman*.] The word " which " must have been omitted, is that right?

Mr *Murray*.] Yes, my Lord.

Lord *Brightman*.] It should be " which were resigned "?

Mr *Murray*.] Yes.

Lord *Campbell of Alloway*.] It should be " which were resigned ", because it is a new grant, is it not? That is right, is it not?

Mr *Murray*.] That is right, my Lord.

Lord *Scarman*.] All of the lands, lordships, baronyes and others were resigned.

Mr *Murray*.] Then it goes on: " with a right to all bypasts maills & ffermes by reason of ward or othrwis with a supplementum of all faults ", and then one comes to the material which is the new part.

Lord *Scarman*.] There is no punctuation.

Mr *Murray*.] No. One can speculate here, but it goes on to deal with the matters which are, in any event, new grants: " united in a free barony . . . to be called the earledome of Annandale & Hartfell ", then the words " with the dignity of ane arl according to the date of James earle of Annandaill & Hartfell & his deceased father their patents the tower & ffortalice of Johnstoun to be the principall messuage for takein of seasin the erection of a free brugh of barony & regality " and so on " in frie heritage barony lordship & earledome "— that is the basis upon which it is to be held—" for paymt of the duetyes & services used & wont as also to be heretable . . . with the right of patronage of Lochmaben and lands y'of to be holden blensch " (which is another method of holding grants) " with liberty of takeing seisin at Lochmaben dispenceing with the lands holding ward & releife fallin in " your Majesty's " hands and accepting of a taxt duety for ward & mariage ", which are relating to the taxs which would be payable under certain circumstances.

Lord *Templeman*.] Mr Murray, is there going to be evidence as to how significant the change is?

Mr *Murray*.] Yes, my Lord.

Lord *Templeman*.] How many of the earldoms in Scotland, at this date—and I am talking about title dignity—had this limitation to come down to the female, and how many (as in the 1661 Patent) were limited to heirs male? You have got to try to put us back in the life of His Majesty in 1660, when whatever a wife had went to her husband, and that was about all she had.

Mr *Murray*.] If it helps, my Lord, I am reminded that in 1661 two were granted to heirs whomsoever: the Earldoms of Middleton and Newborough.

Lord *Brightman*.] This is a narrower grant?

Mr *Murray*.] This is a narrower grant.

Lord *Brightman*.] I have added the word "which" in line 7. That is correct, is it not: "which were resigned"?

Chairman.] Or "which lands".

Mr *Murray*.] Yes, "which lands".

Chairman.] Then it says: "supplementum of all faults". You have not said what that means.

Mr *Murray*.] No. That was deliberate. I wonder if I might defer that and get it through the mouth of a witness?

Lord *Templeman*.] I am sorry, I do not think it is going to make any difference. It is an irrelevance. Do not trouble about that.

Mr *Murray*.] I apologise, I do not know the answer.

Lord *Scarman*.] This, I think, *is* relevant. It is common ground that one of the purposes of the territorial earldom was to change the destination so as to provide for the daughters, but there is no reference to that in this, is there?

Mr *Murray*.] No, indeed, my Lord.

Lord *Scarman*.] Equally, there is no reference to the limitations or destination of the title, but you can say that there is a title of honour, again because of the repetition of "*secundum datas diplomatum*"?

Mr *Murray*.] Indeed. The importance of changing the destination was just as important in respect of the lands, but His Majesty was told "heirs & assignes".

Lord *Templeman*.] I know my noble and learned friend says it is common ground. You will refer me to any evidence that says that is so.

Chairman.] You are quite right in saying that the ordinary reader, seeing the word "heirs" *simpliciter* would appreciate that that included heirs female as well as heirs male; he would know that ordinary land, for example, would descend to heirs daughters, if there was no heir male. If it had been to heirs male, then you would have expected the Docket to say so, but it does not.

Mr *Murray*.] Yes, because then it would have been a limitation from what the general law would provide.

My Lords, those few introductory remarks were what I wished to say at this stage.

Turning to the next branch of the matter, which relates to the circumstances which surround the grant in 1662, on this my submission is as follows. It is plain, when one has regard to the family circumstances at that time, that he was extremely anxious that both lands and honours should go to his own closest connections. In the events which had happened, that inevitably meant entering upon the female line. I intend to lead evidence about this.

In 1662 the Earl had been some 17 years married. He had had five daughters and one son who, I will suggest the proper inference from the evidence is, was probably dead. The son was certainly dead very shortly after the date of this deed. In my submission, the proper inference is that he *was* dead by the date of this deed. The Earl's brother, William of Blacklaws, had died in 1656.

If my Lords are looking at the table, I should make a correction there. What has been done is that the genealogy of the Claimant has had certain additional matters typed onto it, and "William of Blacklaws" is shown in typescript, whereas the rest is in italics. My Lords will see him as number 12, on the righthand side, described as having died unmarried and without issue in 1656. I think that evidence has come to light which will show that he had in fact married, but had no issue, at the time of his death.

Chairman.] That was the general in the Polish army, was it?

Mr *Murray*.] No, that was an earlier soldier of fortune. He was, I think, in the Swedish and French armies.

Chairman.] The one who married a lady who became a duchess later?

Mr *Murray*.] No, that was a later one. He is in the top part; he is shown as number 12. He is the only brother of James the 2nd Earl. It is indicated there that he died unmarried, but that is wrong, he died married. That is what I would wish to correct.

Lord *Templeman*.] But he died in 1656?

Mr *Murray*.] Without issue, yes.

Lord *Templeman*.] Which is the relevant year, from your point of view?

Mr *Murray*.] Yes. At that stage (by which I mean the 1660s), it is not entirely clear who precisely the nearest male heirs would be. However, it is clear, upon any view—and evidence will be led in relation to this—that it was a *remote* connection.

It is against that background that it is, in my submission, entirely appropriate that the Earl should seek, and, indeed, that the monarch should grant, a dignity with a line of succession which went to females. The aim, as expressed in the earlier grants, was to honour him and his father. Particular reference is made to that matter. If the aim is to honour him and his father, then it would seem not at all unreasonable that the monarch should then be asked to make a grant which would provide that in the event of his not having male heirs, he being the only male heir of his father, then the honour should descend through heirs female, because otherwise it is not going to rest with him and his father at all, but it is going, in the circumstances, to go off in some remote way.

Chairman.] The Earl's first son, James, was born in December 1660. Then he proceeded to go and get, or at least the King gave him, the title and dignity of Earl of Annandale, in February 1661. However, presumably James the 1st Earl was confident that his son was going to survive. Would not he have been wise to have taken it to a destination over to heirs female in the first instance?

Mr *Murray*.] My Lord, indeed, one may think that he might have been wiser to do that in the first instance, but it would also suggest that there was a realisation that that was a very imprudent thing to have done (that is to say, to have a succession which was to heirs male).

Chairman.] The death of Colonel William Johnstone of Blacklaws would be neither here nor there in 1661, would it?

Mr *Murray*.] In 1661 the position, as far as we know, would have been that the Earl had one son who was two months old. I think the evidence is pretty clear that that son was certainly dead about 1½ years later.

Lord *Brightman*.] That is so, is it? I thought that it was difficult to establish that James—number 3—had in fact died by April 1662.

Mr *Murray*.] Yes, my Lord. What I am saying is that I am going to invite my Lords to infer, from certain evidence which I propose to lead, that that is the proper inference to be drawn from certain material.

Chairman.] We can see that James the 1st Earl was worried in 1657, after the death of Colonel Johnstone of Blacklaws, because that was the date of the resignation in the Commonwealth period, was it not?

Mr *Murray*.] Indeed, in the Commonwealth period. Of course, that raised a number of problems, if I can mention them briefly at this stage.

One of the problems was simply that: was that resignation a good resignation, in the sense that he had thereby deprived himself of certain dignities? The view of this House in the 19th Century was that that was *not* so, but I shall refer in due course to certain case law which suggests that in the *17th* Century, having regard to a decision of the Scots courts, the view might well have been different; that a resignation was a good resignation, even if it did not achieve anything, unless there was a re-grant.

The point which lies behind *that*, my Lord, is that one has to consider this against the context of the events which were about to take place in 1658 or so. The Protectorate was crumbling, in Scotland at any rate. Oliver Cromwell was dead. His son had succeeded him, but for only a short period, then he in turn abdicated. Then there was a year or so where virtually there was a complete interregnum. The monarch was restored in 1660, but it certainly was 1661 before the wheels of government, and in par-

ticular the wheels of such matters as the grants of charters and what have you, were operating again.

Chairman.] The Protectorate itself was an interregnum, or it was something worse than an interregnum, was it not?

Mr *Murray.*] Indeed, my Lord. After the abdication of the son there was a period which was simply one of no government at all. Perhaps that is a better way to put it.

Lord *Campbell of Alloway.*] Could we have help on this, please? Is there any evidence that the Earl of Annandale's resignation into the hands of General Cromwell on the 14th May 1657 follows on the death of William of Blacklaws? That introduced the female heirs into this resignation, as I understand it. Is there any evidence that this was ever seen by the monarch, or would have been acceptable to him? Is there any evidence to this, either direct or indirect, in any subsequent re-grant by *novodamus?*

Mr *Murray.*] The answer to whether there was any evidence that the Monarch ever saw that is no. I seek to found on this to show what the attitude of the Earl was in regard to trying to achieve the succession which he desired in relation to his lands and his honours, and it is my submission that it is an important adminicle of evidence which your Lordships should take into account in determining what the proper approach is to the circumstances in this case.

Lord *Campbell of Alloway.*] There is no reference of any surrender to this in any relevant document?

Mr *Murray.*] No, my Lord. This matter was discussed in the 19th century and the view was rather taken, I think, that it might have been imprudent to try to tell Stuart Monarchs that deeds contracted as it were under the auspices or settled under the auspices of the Cromwellian era were to have any effect at all.

Lord *Templeman.*] If we are speculating, as we are, about what the position was in 1662, do we know when the first Earl's daughters were born?

Mr *Murray.*] Yes, my Lord. I propose to have this matter brought out in evidence.

Lord *Scarman.*] It is set out in your case.

Lord *Templeman.*] I was looking at the family tree, that is all.

Lord *Scarman.*] There were four daughters, were there?

Mr *Murray.*] Five, my Lord.

Lord *Scarman.*] And they were born between 1652 and 1660?

Mr *Murray.*] That is right.

Lord *Scarman.*] Mr Murray, it might be a convenient moment to ask you this: you will be dealing of course with the resignation of 1657, will you not?

Mr *Murray.*] Yes.

Lord *Scarman.*] Is it legitimate even if one has got to discount it because it was at the end of the period of the Commonwealth to look to it as an indication of the state of mind of the then Earl—what he was trying to do for his family?

Mr *Murray.*] That is precisely my submission, my Lord. That it is valuable evidence.

Lord *Scarman.*] It seems to me it is very relevant and fills in a lot of what would otherwise be gaps.

Mr *Murray.*] What I am going to invite my Lord to do is look at that in the context on which I would propose to lead evidence as to what the genealogoical situation was around that time. It will be my submission that having regard to all the factors which we have been able to ascertain in relation to that, the proper inference is that the deed of 1662 construed in the way which I have suggested it should be construed would be precisely what the Earl would wish would be something which the Monarch would be prepared to grant in relation to his family, and ought to give effect according to what I submit are its proper terms.

Chairman.] I suppose you seek to introduce this as evidence of surrounding circumstances, which is of assistance in construing the deed? Presumably these surrounding circumstances would need to be known to the grantor, namely the King, Charles II.

Mr *Murray.*] The King and those who acted for him may reasonably in my sub-

mission be expected to know something of the family circumstances of so powerful a family as the Johnstone family were.

Lord *Templeman.*] It gives a reason for the difference between the 1661 and the 1662 subject to the argument why did he not think of it in 1661, but it must shed some light on it. If you are faced with the question " Why do you say they made different deeds in 1662 and 1661?" then I think it is fair to look at the family background and see what might have been the reasons for the change.

Lord *Campbell of Alloway.*] Do you think it is permissible in Scots law to construe a document by what the Earl would wish and what the Crown might grant?

Mr *Murray.*] It is legitimate to construe a document according to surrounding circumstances, if there is any dubiety about what it means, in order to fit in with the perceived circumstances.

Lord *Templeman.*] Looking at it the other way round, if he had already got four great hale strapping sons, the argument against it would be of course that it did not make any difference—he had got four sons already and there was no reason to think the line might die out. It is difficult to ignore, in the circumstances, when you are talking about whether they wanted to go down the male or the female or both, and look at it *in vacuo* without looking to see what may have been at the back of somebody's mind.

Mr *Murray.*] My Lord, with that very brief introduction I would propose to invite my Lords to listen to some evidence now. I would propose to invite my Lords first of all I think really to listen to the evidence of the Claimant. That would only be for two purposes: one in relation formally to his pedigree and the other in relation to the family circumstances, since this matter was last before the House in 1879 (well, in fact, 1881, I think), and I do not know whether my Lords would be assisted by having such evidence or not.

Chairman.] What would be the purpose of this evidence—the family circumstances?

Mr *Murray.*] It would only be of assistance insofar as it would show that family circumstances were such that the delay between 1879 and the present time is to be explained by two reasons: one that the individual who in fact was the last Claimant. if I can put it that way, in 1879 had only just succeeded at that stage ; was placed under curatory almost immediately ; remained under curatory until I think 1912. He was succeeded by my client's grandfather, who spent most of his time in Ireland and was not interested in such matters, with an estate which at that time had the burden of indebtedness.

Chairman.] I do not think that is of any great significance. Either the Claimant is entitled or he is not. I think one would be more interested in why the Charter of 1662 was not directly founded upon in the 19th century claims.

Mr Murray.] Yes, my Lord. Well, that will come from other sources.

Chairman.] Very well.

Mr *Murray.*] In that case, my Lord, I would not propose to lead the evidence of the Claimant. I would propose to lead the evidence of Mr Bogie, who will speak to the finding of certain documents which have a bearing in my respectful submission upon this matter.

Chairman.] Which documents are these?

Mr *Murray.*] The two documents to which I make reference here have both been produced. The first is document (1)(*b*) in the blank bundle of Proof documents, and that is the Draft Warrant which is undated.

Chairman.] What use are you planning to make of the Draft Warrant?

Mr *Murray.*] I am proposing to use the Draft Warrant in order to show my Lord that there was a change made in the Warrant to that which became the Signature in 1662, and I am now I think in a position to date the Warrant as preceding that, and the change in my respectful submission is a significant one.

In other words, what I am trying to say is if you have a Draft which is prepared, to anticipate the evidence, in 1661, which makes no reference to the title and

a docket which makes no reference either to the title, and what one has in 1662 is final documents which *do* make such a change, then it demonstrates there has been a change on the part of the family in relation to this matter.

Chairman.] Well, whether or not there is anything in that argument, we had better hear the witness so that you can have a foundation for it.

Mr *Murray.*] I am obliged.

Lord *Templeman.*] Is he going to produce a typed translation of the two or three lines which would be relevant in 1(*a*) and 1(*b*)?

Mr *Murray.*] My Lord, if my Lord wants a typed translation, it can be produced overnight.

Lord *Templeman.*] I think it might be be useful, if you are going to say there is a significant difference between the two, not the whole of it but just the vital bit.

MR DAVID WILSON BOGIE, *Sworn*

Examined by MR MURRAY

1. What is your full name? *A.* David Wilson Bogie.

2. Your age? *A.* 38.

3. You are an advocate? *A.* I am, yes.

4. In 1978 were you asked by Major Maitland Titterton, to undertake certain inquiries in relation to the late Major Percy Hope Johnstone of Annandale as to his claim to the earldom of Annandale and Hartfell? *A.* That is so.

5. I think that in 1980 in the course of these inquiries, which were in your capacity at that time as counsel, you visited Raehills in Dumfriesshire, which is the family seat. *A.* As I recall it was in July 1981.

6. I beg your pardon. *A.* But I did visit Raehills then.

7. Was the purpose of your visit to examine the documents which were kept in the Muniments Room at Raehills?

A. That is so.

8. Were you looking in particular for any material in the years 1661 to 1662? *A.* Yes. I thought it would be rather important for the conduct of this inquiry to see whether there was any correspondence between the members of the Annandale family and either the Duke of Lauderdale or other persons who were advisers of the King at that time.

9. In fact I think you did not discover such correspondence? *A.* I did not discover any correspondence.

10. In the course of searching the Annandale family records at Raehills did you find one document which you thought might be of significance? *A.* Yes.

11. I wonder if that could formally be put before Mr Bogie? It is the document which is number 1(b). (*Document handed to witness*)—*A.* Yes, this is the document which I found.

12. For the purposes of identification, does it contain one part which begins "Our sovereign lord . . ."?—*A.* Yes.

13. Does it also contain another part which begins, "May it please . . ." and then an abbreviation for "your Majesty"? *A.* "Your Majesty", yes.

14. Is the second part on the same document? *A.* It is a separate document on a much smaller piece of paper.

15. I think that in addition to those two documents, did you discover a further scrap of paper? *A.* That is so. All these papers were together.

16. I think that you arranged that these documents should be sent to Professor Donaldson? *A.* Yes, indeed.

17. So far as the position where they were found at Raehills is concerned, did you indicate that by leaving a mark in one of the Raehill's family boxies? *A.* I did, yes. I left directions as to where I had found it.

Mr Murray.] I omitted to say there was another document to which I wish to refer, Mr Bogie. Perhaps I might go straight on to refer to that, my Lord?

Chairman.] Yes, do.

Mr *Murray.*] At a later stage did you again visit Raehills and discover certain documents which my lords will find copied in the additional abstract of evidence on pages 21 and 28. There is a translation of both of these following upon the original documents.

Lord *Campbell of Alloway.*] The second printed bundle?

Mr *Murray.*] The second printed bundle.

18. Mr *Murray.*] (*Document handed to witness*) Is that one of the documents? A document which is marked to the Solicitor General at Murray Place, dated 19th May 1827? *A.* Yes, indeed.

19. With the title: "Mr Riddell remarks on Annandale Patents 1661 and Charter 1662". *A.* Yes.

20. Where did you find that? *A.* I found that in the archives at Raehills. It appears to be a letter in the handwriting of Mr Riddell the peerage lawyer. I have seen quite a number of documents by him now in the National Library of Scotland and I recognise the writing as being his.

21. Is the other document dated Edinburgh, 7th May 1844? *A.* Yes.

22. And it is signed by Mr William Fraser, as he then was, and addressed to James Hope? *A.* Yes. This I also found at Raehill's and I recognised it as the writing of Mr Fraser, afterwards Sir William Fraser, who was the eminent records scholar.

23. *Chairman.*] What was his qualification and position? *A.* He was Keeper of the Records of Scotland? He spent much of his life researching into the Scottish family histories and published numerous works on the subject. He spent some years writing the history of the family Johnstone of Annandale and indeed published a history at the end of the 19th century.

24. Mr *Murray.*] And I think that he frequently was involved in peerage claims? *A.* He was indeed. He acted as adviser to the Johnstones of Annandale during the hearing at the end of the last century, in the '70s.

25. Now, I think that another document has also been handed to you, Mr. Bogie. Could you identify that for me, please? *A.* This is what would appear to be a certified copy of a document which I found in a collection of papers in the National Library of Scotland. Its title is "A copy of Mr Anstruther's opinion for Lord Hopetoun in respect of his claim to the title of Earl Annandale."

26. Was the date of that opinion 1793? *A.* That is so.

27. *Chairman.*] Where abouts did you find it? *A.* I found it in a collection of papers called the Stewart Stevenson collection. This was a collection of papers collected by a certain Andrew Stewart, who was a Dumfries landowner at the end of the 18th century and also a Writer to the Signet who represented some of the major noble families of Scotland. Most of the papers were papers relating to cases which he himself had been involved in, but there were other papers which no doubt he regarded as curiosities and I found this among miscellaneous papers.

28. Mr *Murray.*] This is a copy of the document which is found at page 6, my Lords, of the print in volume 2. It is some 14 pages long. Perhaps lastly, Mr. Bogie, Sir John Anstruther himself who wrote this opinion—can you tell us anything about him? *A.* Sir John Anstruther was a Scottish advocate who was admitted to the Faculty of Advocates at the beginning of the 1770s and eventually was called to the Bar later in the 1770s, by Lincoln's Inn. He was quite an eminent counsel in his day and was one of the persons involved in the matter of the impeachment of Warren Hastings. I understand he had considerable practice in Scottish peerage matters, in those days, and was eventually made Chief Justice of Bengal.

Mr *Murray.*] Thank you. I do not know if the Lord Advocate has any questions?

Chairman.] Have you any questions, Lord Advocate?

The Lord Advocate.] I have no questions, my Lord.

Chairman.] Do any of the Committee wish to ask the witness any questions? (*After a pause*) Thank you very much, Mr Bogie, that is all.

The witness withdrew

Mr *Murray.*] My Lord, I would then propose to move if I might to the evidence of Mr Peskett, who will deal with the family circumstances from a genealogical point of view.

Chairman.] Very well.

MR HUGH PESKETT, *Sworn*

Examined by MR MURRAY

29. Mr *Murray.*] Mr Peskett, have you been engaged on behalf of the Petitioner in this matter, and indeed his late father, to conduct research into certain genealogical aspects of their claims? *A.* Yes.

30. *Chairman.*] May I have your full name? *A.* Hugh Millar Peskett.

31. Mr *Murray.*] And do you specialise in genealogical and ancestry research? *A.* Yes. That is the way I earn my living.

32. And although I think you are based in Winchester, do you conduct a certain amount of such inquiry in relation to Scots matters? *A.* Yes I work in Edinburgh one week every month.

33. Now, I think that you have carried out certain researches in order to see what the situation was in Scotland during the Cromwellian era in relation to the archives? *A.* Yes, that is in my report.

34. And you have furnished a report which is to be found in Part 2 of the Proofs for the Petitioner, beginning at page 33. *A.* Yes. That is my report.

35. Now, is it the case that in about 1651 certain Scottish archives had been taken to London? *A.* Yes.

36. Did that include the Register of the Great Seal? *A.* Yes, and many other archives, as well.

37. And do we know when those returned. *A.* Probably in late 1660 or early the next year.

38. *Chairman.*] This article by Mr David Stevenson that you append to your report—that gives the whole story, does it? *A.* Yes, that is why I included that. That gives more than I know myself.

39. This comes from one of the Stair Society publications, does it? *A.* Yes.

40. Mr *Murray.*] Now, I think if I may take it briefly from you, as I may in this respect, we know that Oliver Cromwell died on the 3rd September 1658 and that his son succeeded as Lord Protector but abdicated in May 1659, the 24th. After that, so far as Scotland was concerned, was there a year of virtual political vacuum? *A.* Yes, there was.

41. Charles II was proclaimed King on the 5th May 1660, but did not reach London until the end of that month, the 29th? *A.* That is correct.

Chairman.] I think you can take this pretty shortly, because all the members of this Committee have, I think, read this report.

42. Mr *Murray.*] It is very conveniently set out in writing here. Well, in that case, my Lord, perhaps I can go simply to the following page, which is page 5, Mr Peskett. You there refer in paragraph 5 and 6 to a table, which you set out. Is this based on your analysis of the entries which are actually to be found in the registers? *A.* Yes, it is. I added up the entries in each category and analysed them.

43. We can see that so far as the Great Seal is concerned, there is a gap between December 1657 and July 1660? *A.* Yes.

44. The same goes for a longer period in relation to the Charters and Patents of Honour? *A.* Yes.

45. *Chairman.*] It might help members of the Committee to explain what an "apprising" is. *A.* In brief that

was when the court granted a creditor the possession of land to draw the rents while the money owing was unpaid, and they could recover their money from the rents of the land.

46. Mr *Murray*.] The distinction between a parchment register and paper register, am I right in thinking, was that the parchment register was the one which dealt with the long-term grants and would include such things as titles of honour? *A*. Yes.

47. Paper registers were, by their nature, more temporary, such as apprisings?. *A*. That is correct.

48. You make reference in paragraph 7 to the Exchequer archives? *A*. Yes.

49. Which are incomplete because of a fire. What was the purpose of the Exchequer Archives? *A*. In this context this is where there would be a record of a resignation.

50. I think over the page in small print you have inserted from the records of the Scottish Record Office the personal register of the macer of the court? *A*. Yes, I have.

51. Does that show it was not until June of 1661 that the first resignation record appears? *A*. That is the evidence of the records, yes.

52. In paragraph 8 of your report you refer to a number of officials who were all taken to hold positions in relation to the rolls and registers of Scotland? *A*. Yes.

53. I think all those appointments were made by Patents dated 19th January 1661? *A*. Yes.

54. The Commissions of Exchequer were 13th February 1661? *A*. Yes.

55. What conclusion would you draw from the date of these? *A*. In the absence of those officers the Register would not operate and the granting of charters in the ordinary way would not operate. There was a process for granting charters but it was a rather clumsy way and basically, in the absence of the officers who would grant charters, some charters of land were not granted.

56. Could we turn please to the family tree, and I think it would be helpful to look at Appendix 7, which is found on page 77 of the print. Do we see the person with whom we are concerned, James, second Earl of Hartfell shown designated A in the left hand corner? *A*. Yes.

57. We see he was married, or his marriage contract was in 1645, and his family is set out on the bottom line? *A*. Yes.

58. I think by the year 1661 there had been a total of six children born to him and his wife, that is Mary chronologically up to James? *A*. Yes.

59. Of whom four are shown as having died young whether or not, and we will come to that later, they were alive in 1661? *A*. Yes.

60. Do we see beyond that, going backwards, that his only brother was Colonel William Johnstone of Blacklaws? *A*. Yes.

61. He died without issue in 1657? *A*. Yes.

62. Go back up the family tree and the Johnstones, who had been created Earls of Hartfell—and we have to go back several generations—until we find there is a brother who has a descendant, and that is Robert Johnstone 1st of Raecleuch. *A*. That is correct.

63. Under the heading of C do you indicate the position of the Johnstone of Raecleuch branch of the family? *A*. Yes, I have.

64. By 1656 does it appear that the males had died, there was no issue except for one woman, Mary, the Lady of Stapleton? *A*. Yes I would add that all the evidence on which this tree is drawn is drawn from previous hearings of this Committee and the Minutes of Evidence.

65. Then we see that under the heading of D that others died in the same or slightly earlier period, all without issue? *A*. Yes.

66. Does this appear to show that by 1661, with the exception of James who had been born on 17th December

1660, the Earl of Annandale and Hartfell created in 1661 was the sole male representative of much of the family? *A*. Yes.

67. In technical terms how close would be the nearest male heir, if one had to go back up the family tree? *A*. On evidence which is not proved in this House, but which is capable of proof, the nearest male would be a fourth cousin.

68. *Chairman.*] Does that mean he and the first earl would have in common a great great great grandfather? *A*. Great, great, great, great grandfather.

69. Mr *Murray*; Four times grandfather? A. Yes.

70. *Chairman.*] I suppose that there was somebody in existence who was capable of being identified as the fourth cousin, was there? *A*. Yes, the earl was aware of them as they were minor land owners in the area and they were using the Johnstone crypt to bury their family, so, yes.

71. Mr *Murray.*] In fact, as it happended, did that particular branch of the family die out shortly thereafter? *A*. Yes, they did.

72. Now, before I go on with the family context, Appendix I to your report, Mr Peskett, is the Chamberlain's accounts. That is the accounts of the man (one Hew Sinclair) who looked after the Earl's affairs. *A*. Yes.

73. Have you taken these entries from the accounts book of Mr Sinclair? *A*. Yes, I have.

7. *Chairman.*] Where are they kept at Raehills? Have you seen them yourself, these extracts? *A*. Yes, I have. They are kept in the archives at Raehills.

75. Mr *Murray.*] I think that dealing first of all with Colonel William Johnstone of Blacklaws, if we see the entry at item 91 and 92, it says "Item for 48 torches sent to Newbie to Livt Coll Jonstounes buriell the 19 of Febrii 1657 at 12s the piece . . .". That obviously must follow upon the death of Colonel William Johnstone. *A*. Yes. That is the most conclusive evidence we have of his death.

76. Now, if you turn to Appendix IV, which is on page 60, there is a document, a typescript, there which is headed "A lawyer's memorandum". *A*. Yes.

77. Did you find that? *A*. Likewise that was in the Raehills archives, yes.

78. And it seems to bear the date 13th March 1656, "Memorandum for the Erle of Heartfell". *A*. Yes.

79. And perhaps I can refer you to the entry which is at lines 561, and following, and it there says "In the assignatioun to the teynds and reversiounes to be conceaved thus that my Lord failzieing of airs maill gottin of his oune body Or incaice of her deceises without airs maill He assignes to his brother William and the heirs of talzie abovementionat the ryts of the teynds and reversiounes." *A*. Yes.

80. So that suggests that clearly William was still alive as one might expect on the 13th March 1656. *A*. Yes.

81. And is the last entry that "my Lord dispone with the estait his titill of honor"? *A*. Yes, that is correct

82. And as you understand the situation at that stage, in 1656, would the Colonel have been the heir male in respect of the lands and the Earldom? *A*. Yes. The Colonel was the only close male relation of the Earl.

83. Lord *Templeman.*] Was this a recommendation—it cannot be a will—of what he ought to ask for in a church, or something? *A*. My impression is that they were rearranging the Earl's marriage settlement at the time.

84. Then he could not dispose his title with the estate, his title of honour at 570. *A*. The practice prior to the Union was that he could resign it and get a regrant of it.

85. Get a regrant to somebody not necessarily the next one in line? *A*. This was the practice prior to the Union, yes.

86. *Chairman.*] Would you gather this memorandum to be instructions which the lawyers had received from the Earl or an aide memoire for the lawyer as to what he should recommend the

Earl to do, or what? *A.* I would regard this as an aide memoire, probably.

87. Lord *Scarman.*] I should regard it as a memo., which is what he called it—something to be noted. *A.* Yes.

88. *Chairman.*] It is you that call it a "lawyer's memorandum", I think, is it? *A. Yes.* That is the title written at the top of the document.

89. Lord *Scarman.*] That is your title, is it not? It is a good word. *A.* Yes.

90. 570—"Item that my Lord dispone with the estait his titill of honor"—that is reminding himself he had got to do something about it. He has got to take the steps to secure disposing of the estate and with the estate the title of honour. *A.* Yes.

91. Mr *Murray.*] Now, if I can go on to paragraphs 13 and 14, briefly Mr Peskett I think your researches in the Charter room of the Petitioner have disclosed that in fact Colonel William Johnstone of Blacklaws served in a Swedish army and married while serving in the Swedish army? *A.* Yes.

92. Partly at least in Riga in Latvia, and he seems to have left an estate in Finland. *A.* Yes.

93. But there is no suggestion that he left a child, and we know that the Earl succeeded to his estate in Scotland. *A.* Yes. There are in all some 9 letters relating to the estate and there is a reference to a relict but there is not any reference to a child of the marriage, and as the lands of Blacklaws were inherited by the Earl, the presumption must be that there was no child of the marriage.

94. Now, in paragraph 16, you set out in words what I think we have seen already from looking at the pedigree chart, which is the extinction of the Johnstones of Raecleuch and Howcleuch, who had been in this context relatively close relatives of the Earl? *A.* Yes.

95. So that by February 1657, after his brother's death, the Earl is the only surviving heir male of the body of his great-great-great-grandfather, John Johnstone of Johnstone, who died in 1567? *A.* Yes.

96. Now, you refer in paragraph 17 to the Johnstones of Corrie and Girthead. Are these the people whom you have earlier told His Lordship in the Chair would be fourth cousins? *A.* Yes.

97. Now, in paragraph 18 you deal with the issue of the Earl's own marriage and in paragraph 18, when you refer to "at that time", you are referring to 1657? *A.* Yes, I am.

98. And as we can see at that stage the only children born to the Earl were Mary, Margaret and Henrietta. *A.* Yes.

99. We know that the older two survived and went on to marry, and Henrietta, you have indicated, died young. *A.* Yes.

100. And I think that we can see that in 1657 at any rate she was still alive because in Appendix I, the Chamberlain's accounts, page 19, item 129 there is "inquyre how Lady Henreta then seik was." *A.* Yes.

101. No you then wish to make reference to the Bond of Tailzie and Resignation. *A.* Yes.

Mr *Murray.*] My Lord, I understand this is available to your Lordships. This is one of the matters where there was some confusion as to whether there had been copy or not. I understand copies are available, and perhaps it would be convenient if your Lordships were to look at that along with the witness.

Chairman.] Very well. This is the Act of Ratification, is it?

Mr *Murray.*] This is the Bond of Tailzie and Resignation by the Earl dated 14th May 1657. (*Document distributed*).

Chairman.] What we have been given is a bundle of minutes, 468, 18th June 1877. Where is it?

Mr *Murray.*] Unfortunately it is the last document in my bundle. It is a resignation dated 19th June, page 268.

Lord *Campbell of Alloway.*] I thought the date was 14th May, the Bond of Tailzie and Resignation?

Mr *Murray.*] The answer to that is that there are two dates because there is the date of the deed and there is the date on which it was registered. It was

registered on 19th June but actually dated in May.

Lord *Campbell of Alloway*.] So it is the same document?

102. Mr *Murray*.] Yes, it is the same document. I think we see at the beginning of this document that it recites: "Be it kend till all mean be thir present Ires we James Earl of Hairtfell Lord Jonstoune of Lochvood Moffetdaill & Evandaill ffor dyvers weightie causes and considerationes moveing ws and speciallie for the weill & standing of our famelie honor and dignitie in our awin posteritie & children of our awin bodie and failzeing of them in the persones o ourr utheres aires of failzie & provisioune in maner and under the conditiounes efterspeit to be bund & oblist and be thir pntes bindis & obleiss ws our aires maill lyne tailzie and provisioune & all utheres our aires and seccessors whatsumever to mak dew & lawfull resignatioune of our honor title and dignitie . . .", and then he goes on and mentions the lands and there is a long list? *A*. Yes.

103. He is binding himself at that time to resign the titles and dignities which he then had together with all the land which he had? *A*. Yes.

Mr *Murray*.] And the object for which he is doing that, one can see, is to be found on page 271.

Lord *Templeman*.] I am getting muddled. He then had a peerage dignity, did he?

Mr *Murray*.] Yes.

Lord *Templeman*.] That is is the first Earl, he had the title under some earlier grant?

Mr *Murray*.] He was not then Earl of Annandale, he was Earl of Hartfell. He had succeeded his father in 1643 who had the Earldom of Hartfell granted to him in 1643.

On page 217 there is an italicised provision and it is asking for new rights and enfiefment to be made and granted by our "saidis superiore rex'ive"— fourth line.

Chairman.] In the hand of immediate superiors?

Mr *Murray*.] " . . . or thairr com'issioneres" and that is a reference to the Cromwellian position.

104. Then it goes on: " . . . and for new rightes and infeftmentes to be maid and grantit be our saidis superiore re'ive under the condtiounes provisiounes limitatiounes and restrictiounes under wreittin to ws the said James erle of Hairtfell and the aires maill lawfullie gottin or to be gottin of our bodie qlkies failzeing to the first air femall of our bodie without divisiounes and the aires lawfullie to be gottin of her bodie qlkis failzeing to our remanent aires femall according to their birthe successive without divisioune and the aires lawfullie to be begottin of yr bodies . . ." and then it goes finally to Lady Mary Johnstone, and I think that was his sister? *A*. Yes, it was.

105. There is a different reference to heirs made and then Lady Janet Johnstone and that is his other sister? *A*. Yes, it was.

106. And the heirs male of her body. Then it goes back to the heirs female of his sister Mary, then the heirs female of his sister, Janet, and then one sees below, that that it falls to any such person or persons as we shall at any time during our lifetime nominate and design? *A*. Yes.

Lord *Campbell of Alloway*.] This is the document, is it, that there is no evidence that it was ever seen by the King?

Mr *Murray*.] That is correct. This was a document, as one sees if one turns on to the following page, or two pages, page 274, which was made or subscribed by the earl who is then described as Hartfell on the 14th May 1657, and my Lord will see that below that, 19th June, which is the date when it was received in the register.

107. If I may take you back to the provision on page 271, Mr Peskett. Is this provision made such that if that was followed through then the title which he was resigning and the land would not pass out of the descendants of the earl himself or the descendants of his father so long as any of those were in life? *A*. That is correct, yes.

108. At that point he then reserved leave to assign the whole to such person as he chose? *A.* Yes, that is correct.

109. At that time, that is 1657, in contrast to what that particular set of destinations provides, what would have happened had the earl died in 1657 without making such provision? *A.* Then the lands and the title or most of the lands and the title would have gone to his cousin and left his own family not provided for.

110. I think you have indicated to us earlier that by this period the Register of the Great Seal had virtually ceased to function and you say in your paragraph 20 that only three charters, apart from charters of apprising, passed the Great Seal in the first six months of 1657? *A.* Yes, that is correct.

111. *Chairman.*] At that time was there any way for somebody in the earl's position to make provision for his daughters, say, without resigning the land and getting a re-grant? *A.* If the lands were entailed then it would involve breaking the entail in some way and, depending on the nature of the entail——

112. These lands were not entailed, were they? *A.* There were previous Charters, I believe, whereby they were entailed to the heirs male.

Mr *Murray.*] If you look back to Appendix I, lines 200 to 202.

Chairman.] Which page? —

113. Mr *Murray.*] Page 53, my Lord, March 13th: "Item to James Broun, measser in exchequer in who is hands in name thereof your lo' wholl lands wer resigned according to the signater." And then there is a payment? *A.* Yes.

114. Can you assist us with that entry? *A.* This is James Broun, which is the name in the print at the end of the resignation which we have just read. One assumes that this was a James Broun to whom resignations were made, though this was at a later date—James Broun, macer in the exchequer, almost two years later.

115. By May of 1659, this is March 1657, the earl had had at least one more child, perhaps by then two more. Janet would have been born and Isobel was born in April of 1659? *A.* Yes.

116. Lord *Campbell of Alloway.*] Is it relevant to know the destinations of the lands under the 1643 Charter? *A.* There were no lands under the 1643 Charter; there was a patent of earldom to which reference was made later, and that was to heirs male and did not include lands.

117. What was the position of the lands prior to this? You have a resignation at this stage. Is there any evidence of what the position as to lands was at that time? Is it relevant to know that? *A.* I do not know what the precise situation was.

118. Is it relevant, or am I barking up a non-existent tree? *A.* As I recall, there were various Charters as to various lands and most of them were to heirs male.

119. Mr *Murray.*] Can we turn to your Appendix I at pages 53-54? At this stage one has reached the year 1660. Is it clear from these entries that the Earl travelled to London? *A.* Yes, the Earl must have begun his journey when the news of the return of King Charles reached him, and he was on the way when King Charles had not yet reached London. It was obviously very prompt action, or reaction.

Chairman.] Which entry is that?

120. Mr *Murray.*] Entry 252 on page 54: his Lordship goes to London At item 261 we see there is a payment in relation to the "Wrytting over and frameing the great signatour of My Lords Estaite sent to London to My Lord Hary Rollo"? *A.* Yes.

121. At 268 there is a reference to "Andrew Marrtein for wryteing of My-Lords patent to the Earldome of Annandail"? *A.* Yes.

123. *Chairman.*] This is all 1660? *A.* Yes.

124. Mr *Murray.*] At that time was it possible in fact to issue documents in any event? *A.* It was not.

125. *Chairman.*] Looking at line 261 the item on 25 July is not in any of the papers before us? *A.* One assumes it was lost.

126. Lord *Templeman.*] By June of 1661 he was Earl of Hartfell? *A.* Yes, my Lord.

127. He becomes Earl of Hartfell in 1661? *A.* Yes, Annandale and Hartfell.

128. *Chairman.*] When did Charles II get back to London? *A.* That was on 29 May 1660.

129. So, the Earl of Hartfell goes off to London on 6 July? *A.* No; that was when the payment reached the accounts. If you read the entry, there were payment made from 28 May onwards.

130. Lord *Templeman.*] Can I tell you what puzzles me? In June 1659 he is not Earl of Annandale and in connection with what he has got already under advice he wants to introduce the female line because the male line is dying out. By July 1660, as we see from item 268 on page 54, he has a jolly good idea that he will become the Earl of Annandale? *A.* Yes, my Lord.

131. By then he has not got a son? *A.* No.

132. Consistently with his 1659 advice, one would have thought that when the Earldom of Annandale appeared it would preserve the female line, because he still had not got a male child (his wife was pregnant but she did not give birth until December 1660), but when we come to the grant made in 1660 we find it is limited to heirs male? *A.* The grant was in January of the next year. There is no evidence of the terms of the draft which was prepared in 1660; it was a lost draft.

133. We all know that in those days it was very common for heirs to die in infancy. This lady had six who died in infancy; and in those days it was more common for a child to die in infancy than for it to live to be 21. Is it being suggested that he was so overjoyed by the birth of James that he assumed, wrongly, he would live to manhood and it was not necessary to have the Annandale grant altered? I find it very hard to reconcile the terms of the 1661 Charter with the submission that here was a man who was mad keen to have his dignity and everything sent down through the female line. I find it difficult to fit together the terms of the Charter with everything else. That is not a criticism, but I do find it difficult to reconcile the two things. *A.* I would add my personal view, having read many records written at that time, that it was a time when there was order being returned after great chaos and many rather hasty documents were drawn up.

134. One possibility is that the civil service in those days got the 1661 grant wrong and in fact it was put right in 1662. Is that a possibility? *A.* Yes. If you work in the archives of the time, as I do, one is conscious of a great number of slips. There was great chaos, and the officers of the Court were not—

Chairman.] As my noble and learned friend says, it is a bit far-fetched to say that because the Earl was so excited that he had got a son at last he ignored the possibility that the son might die in infancy?

Lord *Templeman.*] One explanation may be that he intended all along to put females in but the bureaucrats got it wrong and put it right in 1662.

135. *Chairman.*] I imagine there was tremendous chaos in the civil service. The King had recently returned from exile. One can imagine whole areas which were ripe for error and confusion? *A.* Yes. The regular officers often were not appointed at that time; they were temporary people, or people new to the job, and in my work I am well aware of all kinds of errors which happened at that time.

136. Mr *Murray.*] It would be right to say that the patent in 1661, unlike the earlier peerage patents of 1643 and the earlier one of Johnstone of Lochwood, had some intent to import the female destination, because whereas the other two were to heirs male, this was to "heirs male whom failing heirs female whatsoever"? *A.* Yes; there was a

consciousness of the need to bring the heirs female into consideration.

137. *Chairman.*] It could be that the person dealing with the matter thought "heirs male" did not mean "heirs male of the body", which is the way it would be construed by an English lawyer? *A.* Yes; and this was drawn up in London.

138. Mr *Murray.*] If we can go on with the entries to which we have been referring, to complete them there is an entry in 1661. There are entries in March at 324: "Item to Andrew Mairtein for wrything a patent and signatour for the titill off Annandaill and Stewartship theroff for My Lord". That would appear to be a fresh payment? *A.* Yes.

139. We know that the patent had been granted in February 1661? *A.* Yes.

140. Had the Earl himself returned to Scotland by the beginning of 1661? *A.* Yes. We see the cost of bringing his trunks and his coach to Scotland at item 304. There is an entry involving his attending the Riding of Parliament. I cannot find it now, but it proves his presence in Edinburgh in January.

141. *Chairman.*] Have your researchers of the Johnstone records revealed who Andrew Martin is who wrote his patent and Signature? *A.* He was a well known lawyer in Edinburgh and he is of note elsewhere as he rescued certain of the archives from removal to London. He is mentioned in a printed article which I included in my report.

142. If he was a lawyer, presumably he would have got it right if he had wanted to draw the patent in favour of heirs male of the body and exclude heirs female? *A.* He would have drawn the patent but the engrossment would have been drawn in London.

143. He may have drafted it right but somebody in London altered it? *A.* Yes.

Lord *Templeman.*] He paid enough for it. Look at 336, 340 and so on. That is a lot of money. There was a reduction from the Lord Chancellor.

144. *Chairman.*] These items would have been in Scottish money. What was its value in comparison with English money? *A.* It was one-twelfth the value.

145. Lord *Campbell of Alloway.*] Is there any other case where you have found a patent properly drawn up, presumably one drawn up by a competent draftsman who knew his Scots law, but altered as a result of some procedure in London? *A.* No, my Lord, but I must admit that others have not had the attention this one has received.

146. My question is this, that though you may have had a patent competently drawn by a draftsman in Scotland, there were a lot of slips being made in London by the civil service in those days. In your researches have you come across this situation before? *A.* No, my Lord, I have not.

147. Mr *Murray.*] You said that you had come across slips in the course of the operation of the Register of Deeds? *A.* In many other records all over the British Isles at that time there was great chaos and many errors were made, and even hearings were held in the wrong courts; things like that happened at the time.

148. You make the point in paragraph 22 that most of these accounts would be matters arising some months after the occurrence of the event which gave rise to the payment? *A.* This was usual, yes.

149. We know that the son James was born on 17 December 1660? *A.* Yes.

150. We also know that he was baptised on 23 December 1661? *A.* Yes.

151. We have now got a situation in which the Earl did have a son in 1661? *A.* Yes.

152. You indicate in paragraph 24 that the register had begun to function again since September 1660? *A.* Yes.

153. Can we say with some confidence that the infant boy James must have died soon after Christening? *A.* This is a point which one can only infer. There is no evidence of a funeral or anything like that, but the last reference to the infant Earl was the cost of a cradle in March 1662.

154. *Chairman.*] You did not find any records in the chemberlain's accounts of the cost of funerals, or anything like that? *A.* No. The problem was that at that time the Earl was living in Edinburgh and the chamberlain was in Annandale. When the Earl was in Edinburgh and away from home the more personal items were not in the accounts.

155. Mr *Murray.*] Were there items for sending sums of money to the Earl when he was both in London and Edinburgh so he could discharge debts himself? *A.* That is correct, yes.

156. Would you look at Appendix IV headed "Lady Graham's letter of 12 January 1664"? *A.* Yes.

157. As regards the year, that is a deduction which you have made? *A.* Yes; I worked that out from a reference to the death of the Countess of Tullibardin which is mentioned in the letter. I was able to work out from the Complete Peerage when the Countess had died, and from that I could work out the year of the letter.

158. In that letter at lines 511 and following there is a sentence beginning "My humble service to my Lady Marquess". You have identified her as the Countess of Annandale's mother? *A.* Yes.

159. It goes on: ". . . and my dear sister, I pray God might make her a joyful mother that I may have the happiness of a nephew which may bear the name of my dear Brother." *A.* Yes.

160. We know that the next child born to the Countess was born on 17 February 1664? *A.* Yes.

161. She would have been some eight months' pregnant at that time? *A.* Yes.

162. *Chairman.*] The first son was called James. You infer that James must have died and that Lady Graham is contemplating that the next child will be a boy and will also be called James? *A.* Not if it was the name of Johnstone; it might be either.

163. You mean it might be another James? If it is the name of Johnstone the first James might still be alive, might he not? *A.* I would read this as meaning that there was no male heir at the time and they hoped that the Countess, who was then eight months' pregnant would have the long-awaited male child—one who would live rather than die.

Lord *Campbell of Alloway.*] Can one assume there is no male heir at this time?

164. Mr *Murray.*] One knows that the little boy who had been born in 1660 was called James which was the name of his father? *A.* Yes.

165. So, if the Earl's sister is writing in 1664 hoping that her sister-in-law will have a son who may bear the name of her "dear Brother", it would seem clear that there was then no person alive who was a son bearing the name of her "dear Brother"? *A.* That is correct.

166. *Chairman.*] It would be very unlikely that anybody would call their second son after the name of the first son? *A.* It was common in fact, if there was a name which ran in the family. There are numerous cases where they used the name again.

167. Lord *Templeman.*] We know that James was born on 17 December 1660, and there is a record of payment for a cradle in March 1662. We know that Lady Graham was writing in January 1664 and that Willliam was born in February 1664, and there is a strong possibility that James died some time between the beginning of 1662 and January 1664. Would you put it higher than that? *A.* That is all one can draw from the actual evidence.

168. It is against that that we have the date of the 1662 document. It must have taken some months to draft. It went to London and then went through Charles II's civil service and then emerged? *A.* The inference from the accounts is that the drafting was only one or two months prior to . . . . . .

Lord *Templeman.*] What is the date of the 1662 document?

Chairman.] 23 April.

169. Lord *Templeman.*] So, the draft had come down from Scotland in March 1662. It does not leave much time for the young James to die; if you are right, the situation seems to be more consistent with there having been a mistake in the 1661 date? *A.* The cradle was paid for in March; it was probably ordered two months before.

Lord *Templeman.*] The latest firm date is 23 December 1661, the baptism, and in March 1662 we have the draft Charter, which leaves time for James to die and everybody to change their minds.

170. *Chairman.*] He was not Christened for a year after his birth. It may be he was Christened when he was ***in extremis***? *A.* It is quite possible. It is an interesting point that English midwives even now are trained to baptise a child which is weakly at birth.

171. Lord *Templeman.*] That is as far as the evidence goes. *A.* In the accounts of April 1662 there is the cost of drafting a signature in London.

172. Lord *Campbell of Alloway.*] Item 550 refers to the first concept of a resignation? *A.* I was looking at the accounts on page 56.

173. Mr *Murray.*] Lines 407-410: "Item to James Kennedy at tua severall tymes for his paynes taking in helping to Exped My Lords great Signature at London according to your Lo'ps directione . . .", which I suppose means "dealing with the matter speedily"? *A.* Yes.

174. There is another account which you have found in Appendix II at page 58? *A.* Yes.

175. This is an extract from the account of William Hunter WS. Who was he. *A.* William Hunter was the Earl's writer, and he appears in the other accounts at times.

176. But you indicate in your note that the account must relate to a period which goes as far as 1664? *A.* Yes. Though the account is undated, I have drawn this inference from references in other records of the Johnstones.

Lord *Campbell of Alloway.*] Can you date Appendix IV, line 550? That appears to be the first mention of a resignation and an attempt to obtain a regrant Have you dated lines 550, 551 and 552 on page 60?

177. Mr *Murray.*] Line 530 is the answer; it is dated March 13 1656? *A.* That would not be the resignation because it is a resignation of the Earldom of Annandale and Hartfell and at that earlier period there was no Earldom of Annandale and Hartfell.

Chairman.] We took it that this memorandum was related to the resignation in Commonwealth times.

178. Mr *Murray.*] There may be some confusion. Mr Peskett, Appendix IV, commencing with line 524, is one document dated March 13 1656. All that is there contained relates to the Earl's marriage contract and the combination of the estates and titles of honour? *A.* Yes.

179. At page 58, where one sees extracts from the account of William Hunter, you have inferred from other evidence that that must cover the period up to 1664, although the accounts bear no date. At line 434 we see "The Earle of Annandaill his compt to the deceast William Hunter"? *A.* Yes.

180. So, it suggests that it has been drawn by somebody after 1664 when William Hunter is dead and is no longer acting in the matters which you can date to 1664? *A.* Yes.

181. One sees between lines 443 and 447 the comment: "Item for drawing and formeing the signator of the Earledome of Annandaill and Hartfiell quhich was sent to London quherin ther was much more lands insert then in the former the haill lands erected in ane free Earledome and lordship and regalitie abowe 20 tymes w[rit]ine over . . ." Does that suggest there were frequent revisions of that particular document? *A.* Yes, much drafting and redrafting.

Chairman.] Is that a convenient moment?

Mr *Murray.*] Yes, my Lord.

Chairman.] The Committee will adjourn and meet again tomorrow morning at ten-thirty.

(*Adjourned until tomorrow at* 10.30 *am*)

Tuesday the 18th of June 1985

Lords present:

Aberdare, L.
Beswick, L.
Brightman, L.
Caccia, L.
Campbell of Alloway, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair

Counsel and Parties were ordered to be called in

MR H M PESKETT, *recalled*

Examination by MR MURRAY *continued*

182. Mr Peskett, I want to ask you some questions relating to certain Signatures. Would you look in the second pink volume to that part headed " Illustrative Charters " and to page 30 which is headed " Signature for Territorial Earldom of Aboyne Charter 1662 "? *A.* Yes.

183. Were you responsible for obtaining that document? *A.* Yes, I was.

184. Would you look at the original which has been produced? (*Document handed to the witness*). Is that the original from which you made a typed transcript? *A.* It is a copy of the original, yes.

185. What has been produced is an official copy of a document in the Public Records of Scotland; it has been transcribed? *A.* Yes.

186. *Chairman.*] It is an official extract? *A.* Yes, my Lord.

187. Mr *Murray.*] On page 32 of the print do we see a Signature for the territorial Earldom of Orkney in 1662? *A.* Yes.

188. Again, is that a certified copy of the relevant document in the Scottish Records? *A.* Yes, it is.

189. Is the typed bit your transcript of the portions thereof? *A.* Yes, it is.

190. At page 55 do we see " Regrant of Earldom of Kilmarnock Charter 1707 "? *A.* Yes.

Lord *Scarman.*] This is before the Act of Union?

Mr *Murray.*] Yes; it is dated 22 January 1707.

Chairman.] Is this the Stair Charter?

Mr *Murray.*] No, just before the Stair Charter. I must apologise; it is on page 53, not page 55.

Chairman.] I see it.

191. Mr *Murray.*] Mr Peskett, did you transcribe the portions which are typed from the official copy which you hold in your hand? *A.* I translated and transcribed, yes.

192. Can you tell me one other thing in relation to the Signatures? Were Signatures kept in relation to all of the deeds, by which I mean Charters, in that period? *A.* At that period, most of them were. The earlier ones often were not preserved, as one assumes that the attitude was that once the Charter was granted the warrant or English language draft was of little importance, but after the middle 1660s almost all of them were preserved.

193. *Chairman.*] In the Record Office? *A.* Yes, in the Register House in Edinburgh.

194. Lord *Scarman.*] Obviously, there was considerable confusion in London after the restoration in 1660. How long did that period of confusion last? *A.* My impression is that it was of the order of 18 months.

195. Speaking generally? *A.* Yes.

196. That is your impression derived from your scholarly researches? *A.* That is from work in many archives in the two kingdoms.

197. *Chairman.*] Counting from when? *A.* From the return of Charles.

198. From May 1660? *A.* Yes.

199. Mr *Murray.*] There is one last question in relation to the matter of Signatures. Until 1603 when the Monarch moved to London for the most part all the Signatures would have been signed personally by the Monarch? *A.* Yes, that is correct.

200. It is only after 1603 that the distinction between those signed by the Monarch and those passed under the cachet becomes important? *A.* Yes, that is correct.

Mr *Murray.*] I have no further questions of Mr Peskett at this stage.

Chairman: Is there any cross-examination by the Lord Advocate?

Cross-examined by The Lord Advocate

201. There are only two matters I wish to raise. Mr Peskett, have you had an opportunity of reading certain representations which have been put before the House in relation to this claim? *A.* I have read a number of them, not all of them.

202. I wonder whether you would be so kind as to look at a recent memorandum which has been received from the Soutter family, in particular paragraph 16. I hand you my copy. (*Same handed to the witness*). *A.* Yes, I have read this.

203. Have you any comments to make upon what appears in that paragraph of the Soutter memorandum? *A.* I have not looked at all the evidence which is mentioned, but my impression is that if the genealogy which is claimed here is genuine there are other closer claimants as "heirs male whatsoever" whose cases would need to be looked into. There are other possible claimants in Ireland, but these all need looking into, but whether or not it is true I cannot say on what I know at present.

204. For instance, would you have anything to say in regard to what appears in this paragraph as to the reason why application may have been made to the Scots Parliament in 1663 for an Act to change the name of Soutter? *A.* I have not read the evidence and it is very difficult to make any valid comment on it in that context, but there have been a great many people who have claimed genealogical connections with heirs male of the Johnstones in the past, and this includes a member of the Soutter family in, I believe, the 1850s. They did bring a petition before this House which was either rejected or not proceeded with.

205. There is one other matter. I want to be quite clear as to your views. I think you are aware there have been representations made by Johnstones from Carolina? *A.* Yes.

206. I do not want to go into detail about this, but have you personally been involved in examining that client? *A.* I was originally retained by clients of that family prior to being retained by the Hope Johnstones, and I advised them that their claim, which rested on one document, was basically unsound and invalid.

207. Do I understand that that forms part of the report which appears within the papers in the present Petition? *A.* Yes, it does, and there has been a recent letter from a Mr James Johnstone of Carolina, and that letter has emphasised the weakest link in their claim, which is that their claim depends on Major-General John Johnstone begetting issue 12 years after he was dead.

208. From that answer, Mr Peskett, do I take it that in giving the evidence you have given in this case you have also had regard to the representations which have been made to this Committee

by the South Carolina Johnstones? *A.* Yes, I have.

209. I would like to turn to one last matter in relation to the appendix to your supplementary report. I wonder if you could be so good as to assist me in one matter. At page 54 of the second volume at lines 268-270 do we find: "Item to Andrew Marrtein for wryteing My Lords patent to the Earldome of Annandail and a Signatour for the Stewartshipe thereoff which was both sent to Londone . . ."? *A.* Yes.

210. What do you deduce from this particular item in the accounts? *A.* At that timc, or possibly a few months earlier, that they had drafted a patent of the Earldom which could well relate to the return of King Charles in May.

211. Can you help me as to the words "Signatour for the Stewartshipe thereoff"? What does that mean? *A.* This would relate to the question of jurisdiction, to the Charter for the stewartry of Annandale.

212. If we turn on to the next page, page 55, at lines 324-326, as you pointed out yesterday, we appear to have in March 1661, that is to say, some nine or ten months later, an item, again to Andrew Martin, "for wryting a patent and signatour for the titill of Annandaill and Stewartship thereoff for My Lord . . ." *A.* Yes.

213. As far as your researehes go, would this suggest a second draft? *A.* Yes. There are regular references to drafts ovcr the years in these accounts, and the entry to which you refer is probably a month or two earlier than the actual patent which would be the patent of 1661.

214. The only reason I raise it is that I notiee in this particular item a sum of money but in the previous item you have "[amount blank]". Is there any significanee in that? *A.* Purely that in the previous entry the clerk was careless and left out the amount of money; it was no more than that. If you look at the next entry under it, on August 11 again the amount is left blank, and the previous entry is the same. It was purely careless keeping of the accounts—nothing more than that.

215. If we go to the bottom of page 55, do we find at lines 354 and 355: "Item to Johne Attchisone that translaitted and wrote the patent for his paynes and favour"? *A.* Yes.

216. Does that relate to the fact that the patent would be written in Latin as a translation of the vernacular draft that Andrew Martin would have prepared? *A.* This is what one would assume, yes, but elearly it was a translation one way or the other, and the most probable answer is that it was the translation into Latin.

217. If we turn to the next page, page 56, could you help me as to line 385 (June 1661)? Thcre is a reference there to "Item for My Lords signatour when it was resigned in the exehequer to Mr Johne Henrysone Master that resigned it." To what does that refer? *A.* After I had written this report I looked up this one. In June there was a resignation and Charter of other lands whieh did not involve the earldom.

218. Do I take it that, if we look further down to lines 397 to 400 where there is a referenee to "To Andrew Mairtein . . Item for expeding My Lords Signatour and Patent for the Stewardshipe of Annandale", that is a reference baek to the patent of 1661? *A.* I would assume that this involved the other Charter. In June rather than the earldom. One can only guess because it is some time in arrears.

219. Thcre is a reference in thc Charter itself in the clause of resignation to eertain deeds being held by William Hunter. Do you reeall that? *A.* Yes. William Hunter was the Earl's writer.

220. Is he the same man whose account you have begun extraeting from on page 58? *A.* Yes, he is; at least one assumes there were not two William Hunters.

221. Again, I did not quite understand your evidence on this appendix. Can you tell me, please in relation to lines 443-446 to what that item appears to relate? *A.* This could well be the drafting prior to the Charter of 1662, but the problem with those accounts is that they are all undated; it is a list

undated clearly written by the executors of William Hunter, or a person the executors employed, to clear up unpaid accounts. It is undated, which means it is difficult to be very conclusive on any of this. It may or may not be in chronological order.

222. You have answered one of the further questions I was going to ask you. At lines 456 and 457 there is a reference to "Item your lo' instrument of resignatione of your haill lands buiking and extracting thereof and parchment thereto." Could that be related to the Charter of 1662? *A.* Very probably, yes.

223. If we look back to lines 449-452, that appears to be an item "for resaigneing the Earledome of Annandaill & Hartfiell in the hands of the lords of exchequer and for wryteing ane instrument of resignatione therupon long buiking and extracting therof and parchment therto." *A.* Yes.

224. Have you found any way of discovering when that item of account can be dated? *A.* No.

225. Other than that it must have been after the creation of the Earldom of Annandale and Hartfell? *A.* Yes; that is all one can say.

226. Can you find any other evidence in any of the documents to which you have had access suggesting there was extant an instrument which resigned the Earldom of Annandale and Hartfell into the hands of the Lords of Exchequer? *A.* No. I have tried to trace any reference which would reconcile with that, but the problem is that the records of the Exchequer were lost in a fire in, I believe, 1812.

227. Would that be the proper method of resigning a peerage dignity prior to its regrant? *A.* If the entry in the accounts is correct one assumes it would be, but we have only this brief entry in the accounts to go on.

228. As far as the Charter of 1662 is concerned, is there any reference within its terms to any instrument of resignation of the Earldom of Annandale and Hartfell? *A.* There is not.

229. Or in the Signature? *A.* There is not.

230. Or in the Docquet? *A.* No. there is no reference in the Charter or anywhere. The reference in William Hunter's account is the only hint that there might have been.

The Lord Advocate.] Thank you very much, Mr. Peskett.

231. *Chairman.*] Mr Peskett, did you have any responsibility in connection with the geneology which the Lord Lyon issued? *A.* Yes, my Lord, I did; my report on General John Johnstone was used.

232. I suppose the Lord Lyon had the record you have appended to your supplementary report? *A.* Yes, my Lord.

233. As far as the pedigree is concerned, was there any real problem apart from the question whether or not Major General John Johnstone may have been survived by male issue? *A.* No, my Lord. Most of this was pretty well proved in previous hearings of the case, and one question mark in all past evidence was the issue of Major General John Johnstone.

234. As far as other claimants who have turned up from time to time are concerned, is there any who claim other than those who claim to be descended in some way from Major General John Johnstone? *A.* The others have claimed as heirs male general from earlier channels.

235. None claims to have been descended from the first Earl of Annandale? *A.* Various people have claimed they are descended from Major General John Johnstone. I get a great many cases involving peerage claims, most of which would never reach your Lordships because they are wild and hopeless. Someone like Major General John Johnstone would always attract a great many people who claim descent from him, but with a name like John Johnstone it is quite easy to dream up a connection if you——

236. There are a lot of John Johnstones about? *A.* Yes, a great many.

237. Lord *Campbell of Alloway.*] I have one question about the term "ac-

cording to the date of prior patent" which appears at page 102 in the Warrant of April 1662 and page 111 of the Docquet. *A.* I believe this is one I have not read.

238. At page 102 you find the phrase, six lines from the bottom, "the Title, Style and Dignity of Earl according to the date of the said James Earl of Annandale", and a reference to the Patent granted, and in the Docquet, seven lines from the end, it refers to "the Dignity of an Earl according to the date of James Earl of Annandale". This throws back a precedence according to the date of a prior Patent? *A.* Yes, my Lord, that is all it is; it is purely a question of precedence, which was a matter of great importance at that time.

239. Did you find any such clause, if I may use that word loosely, in the Stair Charter or the Kilmarnock Charter? *A.* Not in those ones but there are in other Charters.

240. They have been interpreted in the way you describe as throwing back precedence to a prior Patent? *A.* Yes. This was quite common at the time—if there was a previous creation.

241. To what extent is this of relevance to the proof of this claim? *A.* If the Charter was not a creation of an earldom, a titular earldom, the reference to precedence would be utterly pointless.

242. Lord *Scarman.*] What is the nearest precedent of which you have knowledge in the history of this case, that is to say, the conferment of a second title of honour upon a man who already is the first Earl? *A.* I would need time to check individual references.

243. Do you know of one offhand? *A.* Not offhand, but I have met them regularly; I have met many cases, and it is adequately commonplace that one does not take much notice of it.

244. Again, just asking you to search your recollection, realising you are answering on the basis of general experience, what are the sorts of circumstances in which the King chooses to do that? *A.* The most usual case is where there is a resignation and a regrant of peerage.

245. Here we have a resignation and regrant of a territorial title? *A.* And a titular earldom.

246. We have a resignation of land followed by the grant of a territorial earldom? *A.* Yes.

247. If the King was going to grant a title of honour to accompany a territorial earldom, would it be necessary that there should be a resignation of that title of honour as well—the existing title of honour? *A.* The usual practice was to have a resignation, but this is not true in every case, which is why there are a number of cases where titles have more than one destination. As an example, there are two Earls of Mar.

248. *Chairman.*] The second Earldom of Mar was not granted to a pre-existing Earl of Mar; Mary Queen of Scots granted the second Earldom in 1565 to somebody who was not the man who was entitled to the Earldom which went way back to the eleventh century? *A.* Yes.

249. The peculiarity of the present case is that there is said to be a completely new grant of the same title and dignity of Earl to the person who already had it? *A.* Yes, but the practice of resignation and regrant of titles prior to the Union was not uncommon at all.

250. Lord *Scarman.*] I would like to follow that. You will realise I have absolutely no experience of this part of the social history of the Kingdom of Scotland at all, so excuse me if I put it wrongly. You are saying that prior to the Union there were cases in which the King granted a peerage dignity like an earldom to someone who already had a peerage dignity of equal rank? *A.* Yes.

251. And the same name? *A.* Yes, my Lord; the usual practice was resignation and regrant.

252. But here there is no resignation; there is no evidence of a resignation of the title of honour, is there? *A.* That is true.

253. I am directing my questions to a situation which has thatt gap in it. I follow the position if there is a resignation, but we are assuming now that there is no resignation of the existing title of honour; the King comes along and grants a new title of honour of the same rank, of the same name and the same title? *A*. And the same precedence, yes.

254. You say there are such cases; I accept that because I am not in a position to do otherwise. What are the circumstances in which that happens? It seems a very strange thing to me, coming as I do from south of the border? *A*. The usual practice was when there was good reason to change the destination. There are examples where the elder son was either a black sheep or a lunatic, and others where there was no male heir, or other reasons of that kind. One can usually recognise it if one looks at the pedigree and the family history; it is an obvious reason why one would have done that.

255. That leads me to the last question about the family circumstances. I do not want to go into detail, but if in fact the family concern was to alter the destination so as to provide for the descent of the time of honour through the female line where the direct male line died off, would you not expect the appropriate member of the family to execute a resignation so the King could do it and there would be no trouble at all? *A*. That would have been the usual practice, and there is even a hint in William Hunter's account that that may have been the case, but the record is lost.

256. In all of these interesting, fascinating contemporary documents you have shown us—one from William Hunter and the other from the chamberlain —one sees staring out at one the concern about lands, territory and so on but no indication of any concern about the title of honour. *A*. Other than in the Charter of 1662.

257. Have you discounted altogether the possibility that there might have been one and as a result of the confusion of the times we have lost trace of it? *A*. The resignation?

258. Yes; the resignation of the title of honour. *A*. This is a possibility, my Lord. There is a hint of it in William Hunter's account, but one can only call that a hint. It was a time of confusion, and you then had the problem that the relevant archives of the exchequer were lost in a fire.

259. Lord *Templeman*.] Arising out of that, according to the documents in 1661 we have the Charter which grants the title? *A*. The Patent.

260. In 1662 we have the Warrant which grants the lands and the lands are resigned and they are settled on new trusts? *A*. Yes.

261. In the same document? *A* Yes.

262. If a new title has to be granted and no resignation is made there would be a contradiction between the 1661 grant and the 1662 grant? *A*. Yes, my Lord.

263. If you had that contradiction I do not know how it could be resolved, except by the farcical situation of saying that there are two Earls of Annandale both descended from the same original Earl? *A*. Yes.

264. Has there ever been a case of that sort? *A*. There are cases where there have been two titles with one name, as mentioned by the Lord Advocate in his report.

265. Both descendcd from the same Earl. *A*. Yes. For example, there is the Dukedom and Earldom of Sutherland which has only recently gone in two ways.

266. As a result of two conflicting grants? *A*. Yes.

267. *Chairman*.] I take it what happened was that the Earldom was granted under a certain destination and the Dukedom was subsequently granted to the dead Earl under a different destination? *A*. Yes.

268. Lord *Brightman*.] And the Dukedom died out leaving only the Earldom? *A*. No; the Dukedom has gone one way and the Earldom another.

269. Lord *Templeman*.] Has there been a case of two Earls with the same

title claiming under the same grantee—"Our Daddy was Earl; we are descended from Daddy, or the grantee, and now we are two Earls"? *A.* I cannot recall precisely without looking it up.

270. The other question is this, that if there were no resignation of the title that possibility was inherent as from the 1662 grant? *A.* Yes.

271. So, a resignation would have been very important to prevent what I would describe as a farcical situation arising? *A.* A resignation would have been the usual practice.

272. We all know that the resignation of the lands was done in the same document; the King was a party to it and everything was done very formally. How do you visualise that a resignation of the dignity would have been made in this connection? If they did not include it for some unknown reason in the 1662 grant of the land, what kind of document would it be? *A.* There would have been an instrument of resignation which would have been made to the Exchequer.

273. By the Earl? *A.* Yes.

274. Would the Crown have been a party to it, or would it have been the sort of document which the Earl could have executed on his own; could he simply have gone along at ten in the morning and said, "I would like to resign my title", and they would say, "Here is a form; sign here"? How easy would it have been to get rid of an Earldom which the King had granted? Would you need his consent? *A.* One assumes that usually there was a prior arrangement at the drafting stages. The usual practice was a resignation and a regrant as required by the grantee.

275. Were the resignation and regrant in the same document, or in separate documents? *A.* Not necessarily in one document.

276. Lord *Scarman.*] That is why there could be a lost resignation of the dignity? *A.* Yes, my Lord. We only have a hint in William Hunter's account that there may have been one.

277. There is one final question arising out of the questions put by my noble and learned friend Lord Templeman. With respect, I do not think you have quite answered the question he put. I am sure you know the answer, and probably every Scotsman knows the answer, but I am not sure I do. Can a Scottish peerage dignity be resigned without the consent of the King? *A.* I am unaware of whether that has ever happened. One assumes that the King could refuse to take a resignation, but whether or not that occurred I do not know. Obviously, one assumes that the King could refuse, but I am not aware personally of any instance where that happened. One assumes that if it happened there would be no record of it.

278. Lord *Templeman.*] The King makes the grant and the resignation would cut out the Earldom not only from the point of view of the chap who goes along at eleven in the morning to sign the form but from the point of view of his heirs and successors. Would it not be necessary for the resignation of that title which the King has taken the trouble to grant to be done with the consent of the King? *A.* This would be done in the regrant, the resignation and regrant.

279. The regrant could recite, "Whereas the Earl of Annandale has resigned that title with Our approval, now we regrant it"; it would be ratifying the resignation, but there is nothing of that sort in this document? *A.* No.

280. Lord *Scarman.*] But the possibility of a lost resignation cannot be ruled out. At the moment we find it very strange that the King should of his own motion without any move by the family say, "I grant a territorial earldom and I will stick on a peerage dignity with the same destinations." Why should he do it without a family initiative? *A.* That is true; usually these matters were arranged in advance.

281. *Chairman.*] You have the family initiative in the Signature which the family's lawyers prepared, but no doubt there were instances of a resignation of a dignity followed by a regrant on a different destination? *A.* Yes.

282. When that took place did the regrant on the basis of a different des-

tination normally recite the resignation, or did the regrant make no mention of the resignation? *A.* The usual practice was for the resignation to be recited.

283. Are you aware of any instance where the resignation was not recited? *A.* I am aware of none at this moment.

284. Lord *Beswick.*] Would you be so kind as to explain to my simple mind what is the motivation behind the decision to secure the second Charter in 1662? What material advantage was thought to follow? *A.* That this would preserve the lands and title in the issue of the body of the original grantee, that is, the first Earl of Hartfell rather than a remote cousin. The point of it is that, whereas many titles of honour were to a clan chief, which is why the concept of the heirs male general is comprehensible, in this case the grant of the title was personal to the first Earl and the second Earl, and this is recited in the original Earl, and this is recited in the original grant of the Earldom of Annandale, which is one other reason why one assumes they would want the title preserved in the issue of the man personally honoured rather than in a general clan or family.

285. *Chairman.*] You mean the dignity was personal; the King was desirous of rewarding these individuals for meritorious service to him? *A.* Yes.

286. Lord *Aberdare.*] If I may ask about the Act of Ratification of 1669, is that the normal procedure? Does a charter have to be ratified? *A.* It was commonplace; it is a very brief entry in the Acts of Parliament — only one or two lines.

287. It throws no light on it? *A.* No.

288. Lord *Brightman.*] You say it was common form for a charter which was preceded by a resignation to recite the resignation? *A.* That was the usual practice.

289. Do we know that the Charter, or at least the signature, was drafted by Andrew Martin? *A.* Probably.

290. And Andrew Martin, from the number of references to him, seems to have been a very experienced draftsman? *A.* Yes, my lord.

291. Would you think it unlikely that an experienced draftsman like Andrew Martin would have omitted to recite a preceding resignation, if that was the common form? *A.* I would agree with you, my Lord; it would be unlikely, but it would not be impossible.

Chairman.] That is all we have at the moment, Mr Peskett, unless there is any re-examination arising out of the questions my Lords have asked.

Mr *Murray.*] There are one or two points which I might put to Mr Peskett.

Lord *Scarman.*] I do not know whether you will be dealing in argument or otherwise with this witness with the notable absence of any member of the family to rely on the Charter of 1662 throughout the centuries although it must have been known to exist. I would like to hear that matter explored, and I do not know whether it would be appropriate to do that through this witness or by way of argument.

Mr *Murray.*] I propose to deal with that in my final submissions having regard to certain documents and papers before your Lordships.

Lord *Scarman.*] I thought I would warn you now.

Re-examined by Mr Murray

292. Mr Peskett, my Lord Lord Brightman has put some questions relating to Andrew Martin, and perhaps you could have before you bundle No. 2, in particular page 55 which is the first part of your appendix. Do we see there in March 1661 "Item to Andrew Martein for wryting a patent and signatour for the titill off Annandaill and Stewartship thereof for My Lord"? *A.* Yes.

293. If we turn to page 58, do we see at lines 443-447 "Item for drawing and formeing the signator of the Earledome of Annandaill and Hartfiell quhich was sent to London quherin ther was much more lands insert then in the former the haill lands erected in ane free Earledome and lordship and regalitie abowe 20 tymes w[rit]ine over"? *A.* Yes.

294. That appears to be the account of William Hunter? *A.* Yes.

295. Does that not suggest that two different lawyers had a hand in these matters, that Andrew Martin was involved in 1661 but that it was William Hunter who was involved in 1662? *A.* Yes, or possibly they were working jointly; without the dates in William Hunter's account one can only guess.

296. But, having looked at the records, one can see no trace of Andrew Martin being involved in the signature of the Earldom of Annandale and Hartfell which included lands? *A.* That is correct, yes.

297. Lord *Scarman.*] I am sure it is my fault, but, looking at lines 443-447, have you given us the date for that? *A.* There are no dates in that account of William Hunter.

298. Have you been able to infer a date by your researches? *A.* I can only draw inferences from matters inferred in the accounts and the range of years that it covers, and that I mentioned in my note; that is all I can give you.

299. Mr *Murray.*] I think you did indicate to the Lord Advocate that you thought this entry was related to the 1662 Charter? *A.* If it is a resignation of the Earldom of Annandale and Hartfell, when else could one relate it to—other than after the Patent of 1661?

300. I think you were being asked about the item immediately above it at lines 443-446. I think the only document we know about which inserted lands was the Signature of 1662? *A.* Yes.

301. That appears to be before resignation of the earldom as opposed to subsequent thereto? *A.* That is the inference from the order of entries in the account, but as the account was prepared posthumously and is undated one can only assume that.

302. Lord *Campbell of Alloway.*] Prepared by the executors? *A.* Yes.

303. One cannot draw any safe inference from the chronology? *A.* That is correct.

304. Mr *Murray.*] But what one can say is that the item specified at lines 449-452 is one of the costs of "resaigneing the Earledome . . . in the hands of the lords of exchequer", and it suggests it is the cost of actually undergoing that procedure? *A.* Yes.

305. Until the Patent of 1661 there was not an Earldom of Annandale and Hartfell to resign? *A.* That is correct.

306. Until 1662 there was no territorial Earldom? *A.* That is correct.

307. I do not intend to go through the matters which have been put to you because others will cover them, but are you aware of the Earldom of Mansfield and Mansfield? *A.* Yes; now you remind me.

308. Was that a case in which the same individual was granted two Earldoms of Mansfield with different destinations? *A.* Yes.

309. They were held separately for a short time but now they are reunited in the same individual? *A.* That is correct.

310. Mr *Murray.*] My Lord, there is one other matter, which is that the Lord Advocate has handed me this morning a letter which has been submitted by one of the persons who has submitted certain matters in respect of this claim, namely, Miss Treffgarne. This concerns one part of Mr Peskett's evidence given yesterday afternoon.

Chairman.] What is the date of the letter?

Mr *Murray.*] It is dated yesterday, 17 June. I am not sure your Lordships have been furnished with copies of it.

Chairman.] We do not have it.

Mr *Murray.*] It relates to an allegation of an inaccuracy in Mr Peskett's evidence. I do not know if it is appropriate for me to invite Mr Peskett to comment on that letter.

Chairman.] It comments on the evidence he gave yesterday?

Mr *Murray.*] Yes. I am not sure it is right or fair to put it to Mr Peskett at this stage in order that he may comment on it, since the letter has come into the hands of the Lord Advocate.

Chairman.] If you think it would be of assistance, do so.

311. Mr *Murray.*] Mr Peskett, have you seen a copy of a letter which Miss Treffgarne wrote yesterday to the Lord Advocate? *A.* I was told of it; I have not read it.

312. In that letter it is said by Miss Treffgarne: "I wish to object to part of Mr Peskett's evidence this afternoon at the Committee of Privileges sitting. He states that Sir John Johnston of Johnston and Dunskellie (died 1587) had no male heirs apart from the Johnstons of Johnston in Annandale. You will see from the family tree on page 2 of my letter to the Committee that Sir John had a younger son, The Rev Thomas Johnston, who was in fact his third son, from whom the Irish Johnstons are descended. I also enclose a photocopy of the Johnston entry in Burke's Irish Family Records, with which no doubt Mr Peskett is acquainted. I would like to put the record straight." Have you any comment on that? *A.* I am well aware of the claim that there was a younger son who was an Irish clergyman. This claim was originally raised in 1810, and there are records of it in Ireland in what was the office of Ulster King of Arms, now the Genealogical Office. At present there is no evidence that this Irish clergyman was descended as is claimed. I am going to Ireland next month to try to see if there is any truth in it. On present evidence one cannot prove it.

313. *Chairman.*] But this is only relevant anyway to a possible claim under "heirs male general"? *A.* That is correct, which is why I have not troubled your Lordships with the matter.

Mr *Murray.*] I thought it right to bring the matter to the attention of the Committee.

314. Lord *Brightman.*] Can I take you back to item 449-452 on page 58? I understand the argument to be that this must refer to the dignity of the Earldom of Annandale created in 1661 because there was no territorial Earldom at that time. This purports to be a charge in connection with the resigning of that dignity. You would understand it to be a charge paid to a lawyer for doing something? *A.* Yes, my Lord.

315. No doubt "wryteing" means "engrossing"? *A.* Yes.

316. What does "long buiking" mean? *A.* It means a long entry in the register.

317. In what register? *A.* One assumes it was the register of resignations which was lost in the fire.

318. *Chairman.*] The register kept by the Lords of Exchequer? *A.* Yes.

319. Lord *Brightman.*] What does "extracting" mean? *A.* It would mean the making of extract copies presumably for other purposes. One would produce an extract of the resignation when obtaining a regrant.

320. So, it would be an extract of a fully executed resignation? *A.* That is as I would read the entry.

321. *Chairman.*] Was the original Resignation kept in the records of the Lords of Exchequer, or was it merely a copy? *A.* As much as one is aware from burnt records, one is only aware of the register, not the loose originals.

322. When somebody came to register a resignation with the Lords of Exchequer would he hand it in to the clerk, or whoever, and was the original kept there, or was a copy taken and kept in the books and the original given back? *A.* If it was the practice in the register of deeds at that time, which is an example of where the records are preserved, either the original or a copy was left with the court as a loose piece of paper and that was entered in the register; it was entered in the register and the original was not retained by the court. There is an example at the time that the Register of Deeds was breaking down in the Cromwellian period and loose pieces of paper were kept and were not written into the register.

323. You say there was a fire in 1812 which destroyed certain records. Is it known that the records of this period were destroyed in that fire? *A.* This is the presumption as they are not in the present archives. That fire is a well known tragedy as far as archives in Edinburgh are concerned.

324. Lord *Scarman.*] Does it follow there is no documentary evidence of the contents of the Resignation referred to in Mr Hunter's account? *A.* Yes, that is correct.

325. Therefore, my noble and learned friend Lord Brightman put his question to you on the premises that this was the resignation of a peerage dignity. This is a resignation which could be of both the peerage dignity and the territorial earldom, or it could be of only one or conceivably the other? *A.* As the territorial earldom did not exist prior to the Charter of 1662, and there is no hint of any later resignation——

326. It is perfectly clear from lines 443-447 that it was a resignation of a territorial earldom because of the reference to that? *A.* No; that could well mean the lands which were not yet erected into an earldom.

327. And 449-452, the reference to long booking and extracting, look as though part of the contents of the resignation was land? *A.* Yes.

328. *Chairman.*] Is that so? Presumably, whatever the terms of the resignation, "long booking" means that the whole of it was written into the register, does it not? *A.* Yes, my Lord, and I have noticed that in William Hunter's account he tends to use the word "long" as a pretext to charge more.

329. Lord *Scarman.*] One sees what he was at; he was charging for all that? *A.* Yes.

330. *Chairman.*] But can one draw any reference as to whether or not there were any lands included? *A.* Frankly, my Lord, all one has is the entry here.

331. Lord *Brightman.*] I have read lines 443-447 as referring, on the balance of probability, to the signature which preceded the 1662 Charter. Do you agree? *A.* Yes.

332. On that basis, is it possible for the resignation in 449-452 to refer to any resignation except that of the 1661 dignity, unless there was some resignation, which has never been suggested, after the 1662 Charter? *A.* That is correct, my Lord.

333. Do you agree there can be no ambiguity as regards the subject-matter of 449-452 on the evidence which is before us? *A.* I agree, my Lord. What else could it refer to?

334. *Chairman.*] We know that the lands which were erected into the Earldom of Annandale were granted by the Charter of 1662 and were resigned? *A.* Yes.

335. I take it they would have been resigned by a resignation in the hands of the Lords of Exchequer? *A.* That is correct.

336. So, somebody must have prepared and lodged with the Court of Exchequer an extract of the resignation of the land? *A.* Yes.

337. Do we find in the material available any reference to that? *A.* There is only the reference in the Charter itself.

338. Lord *Brightman.*] If 449-452 is an entry which is correctly worded, there could be a resignation of the lands because it refers to the Earldom? *A.* The lands were only erected into an earldom by the Charter of 1662.

339. Lord *Campbell of Alloway.*] It could refer to either, or is that wrong? *A.* If it refers to the lands then it was after the Charter of 1662.

340. But, as you have helpfully said, there is no way in which one can draw any valid conclusion from the chronology. Is a fair way of putting it that one cannot draw any safe conclusion one way or the other? *A.* There is no hint anywhere in any of the other papers of the resignation after 1662 until very late in the century round about 1700; there was a resignation then, but that was well past the period which concerns us.

Lord *Campbell of Alloway.*] But can one draw any safe conclusion and, if so, what is that conclusion?

341. *Chairman.*] You have said there is evidence that a resignation of the Earl-

dom of Annandale was drawn up, and that would be lodged with the Lords of Exchequer? *A.* Yes.

342. It must have been after 1661 because there was no Earldom of Annandale before that? *A.* That is correct.

343. But at the end of the day the inference to be drawn from that is a matter for their Lordships? *A.* Yes, my Lord.

344. Mr *Murray.*] However, could I direct your attention, in view of the last round of questioning, to one other entry on the same page. You have been looking at 449-452 which is specifically related to the resignation of the Earldom of Annandale and Hartfell. There is an item at 456-457 which is "your Lordship's instrument of resignatione of your haill lands buiking and extracting therof and parchment therto"? *A.* Yes.

345. Does it not suggest that this was a separate instrument relating to the lands alone? *A.* This would be very probable, yes; I cannot visualise any other occasion to which it could refer.

346. Does it not suggest that 449-452 relates to one resignation, because this peerage dignity could not have existed before 1661, and 456-457 relates to a resignation of the lands alone? *A.* That is the most reasonable way one can view it; I would completely agree.

347. Lord *Scarman.*] But if their Lordships should infer that there was here evidence of a resignation of the dignity, there really would be no need to do what has been done in your case and in the Lord Advocate's report, that is, to contemplate the possibility of two peerages coninuing? *A.* That is correct.

348. Now we are getting near to what has always seemed to me very secretly to be the truth? *A.* Yes, my Lord.

Chairman.] Thank you, Mr Peskett.

The witness withdrew

Mr *Murray.*] I would propose now to call Professor Donaldson, former Keeper of the Scottish Record Office, who will be able to deal with matters relating to charters of the sixteenth century in general.

PROFESSOR GORDON DONALDSON, *sworn*

Examined by MR MURRAY

349. Professor Donaldson, your name is Gordon Donaldson. You are aged 72 and you are now retired. You have many degrees, both honorary and otherwise. I think you are a Fellow of the Royal Society of Edinburgh and a Fellow of the British Academy. Your career was in the first instance as an assistant keeper in the Scottish Record Office until 1947 when you became a lecturer in Scottish history at Edinburgh University, and from 1963 to 1979 you were Professor of Scottish History and Palaeography at Edinburgh University, and since 1979 you have been Historiographer to HM Queen? *A.* That is correct.

350. I think you have been the editor of several volumes of Scottish historical records, including a number of volumes of the Register of the Privy Seal of Scotland? *A.* Yes.

351. You have had occasion to give evidence in several previous cases relating to matters of pedigree or peerage? *A.* I have.

352. In this instance, have you furnished a report which appears in Bundle 2 at page 87 and following? *A.* Yes.

353. In that report do you deal first with the procedures followed in regard to the issue by the Crown of title, office or land, and do you refer to the preparation of the warrant known as "the Signature"? *A.* Yes.

354. Is the reason why it is called the Signature because the sovereign authenticated that document by personally signing it? *A.* Correct.

355. In the case of what I shall call documents of major importance, was the

Signature authority for the preparation of a charter or other document to give effect to the grant which would be in Latin? *A.* Yes, but there is a more subtle difference than is indicated in my report. In the seventeenth century, if not before, an appointment to a major office or the grant of a title of nobility without the grant of lands did not pass through the seals under the usual procedure but went directly from the Signature to the final charter or letters patent under the Great Seal. A grant of lands, however important, did not jump the seals *per saltum* but went through the normal procedure: Signature, Signet, Privy Seal and finally Great Seal. It is generally true to say that patents were *per saltum* and charters went through the long process. I am not sure this was the invariable practice, but it was the general practice.

356. To make the present case by way of example, we have the Patent of 1661. Might it proceed on the basis of the formal Signature followed by the grant of the Patent itself and deal with all the documentation required, and in relation to lands would there be the several steps you have mentioned in respect of which the lands would pass various seals? *A.* Yes, and the Annandale Charter of 1662 is recorded in the Register of the Privy Seal as well as in the Register of the Great Seal.

357. Can I ask you further about the Signature? The Signature itself was not a title as such; it contained no right in that sense to the grantee? *A.* Correct.

358. But it did contain the terms which the final document, if it was to be a charter, for example, was intended to contain? *A.* Not merely the general terms but all the details, the precise terminology; it is all there in the vernacular Signature.

359. If we take this case by way of example, there have been produced the Signature of 1662 and the Charter of 1662, and the Latin text of the Charter, leaving aside the introductory passages and perhaps certain terminating passages, is an accurate translation of the terms of the vernacular under the Signature of the same period? *A.* That is my experience.

360. In the present case you have looked at both the Warrant and the Charter and found that to be so? *A.* Yes.

361. Perhaps you could help me in this way: As far as the Signature is concerned, what happened to it after it had been signed by the King? Did it come back to Edinburgh for the preparation of the Charter in Edinburgh? *A.* It went to the Keeper of the Signet, and it was the Signet Office which had the job of translating it into Latin. It went on to the Keeper of the Privy Seal who prepared a precept commanding the Chancellor or Keeper of the Great Seal to draw up a charter in Latin on parchment and append the Great Seal to it, and it was then recorded in the Register of the Great Seal.

362. Does that mean that the Latin text would be translated more than once? *A.* I would not have thought that any clerk at any stage would go back to the original vernacular if he already had a Latin translation in his hand in whole or in part, but I have checked the Latin translation prepared under the Privy Seal and I can detect no difference between that translation and the Latin translation which appears in the final Charter under the Great Seal.

363. It might be helpful if at this point you could help us with one or two terms as to the procedure involved. This morning my Lords have heard about something referred to, in relation to resignations, as "long booking and extracting". What was "long booking"? *A.* The adverb "long" slightly puzzles me; "booking" is perfectly understandable; that means having a document recorded in a register or a court book or act book for permanent preservation, and with additional authority perhaps, but I confess that "long' 'is new to me. "Extracting" is equally clear. The term "extract" in Scottish usage, and perhaps elsewhere, does not mean "making an excerpt from a document" but "extracting an entire entry from the register", so the extract would be a complete copy of the document.

364 Lord *Scarman.*] "Long" might not be clear to a professor, but it would be very clear to a Writer to the Signet

who had to do the work? *A.* Yes; it would be wearying.

365. *Chairman.*] At any rate, the term suggests that the document referred to has been copied into the books by the keeper of some records? *A.* That is so.

366. Mr *Murray.*] Was an extract in some way authenticated? *A.* Yes, certainly, and it is still done today. Nowadays an extract from the register is made by furnishing a photocopy, but it is authenticated. Until fairly recently it was copied by hand and duly signed by the keeper of the records, or somebody holding a commission on his behalf. Of course, a great deal of the work has vanished with the introduction of photocopying.

367. As far as the Signatures themselves were concerned, have the Signatures for the seventeenth century been retained in the records of Scotland? *A.* Until about this period, the 1660s, there are very few of them. I suppose the general idea was that once the charter had been drawn up and recorded in the Register of the Great Seal there was not much point in preserving the Signatures, but we cannot lose sight of the fact that possibly a batch of Signatures might have been the records lost in 1660 or 1661 on the way back from London. There are very few before 1660, but from about that period they become much more numerous, and not long after they began to be copied in a volume so you had the Signatures in volume form as well as in paper form, which was an enormous advantage. I am not sure if this was explained yesterday, but the Signatures consist of a series of sheets gummed to each other end to end; it is not in codex form. It would certainly stretch across this room, or even from end to end. It was a big advantage to have them in volume form, and this began to happen.

368. We have already heard something about the political and administrative upheavals in the period between approximately 1657 and 1661. Have you come across instances of that? *A.* Yes. I concur with the picture which Mr Peskett presented yesterday. One has to remember that as far as peerages were concerned, there were no transactions in peerages during the Commonwealth period because technically there were no peerages. Oliver Cromwell ultimately established an Upper House, but the persons appointed to sit in that Upper House were appointed under the Great Seal of the Commonwealth kept in London. There was a Great Seal kept in the name of Oliver and then in the name of Richard the Protector. Charters of land were dealt with in the normal way, but not charters of title. Oliver died on 3 September 1658 and was succeeded by Richard as Protector for about nine months when Richard resigned. As far as I can work out, there was a period of approximately a year when there was no central administration in the country, and it was only when the King returned to London in May 1660 that it was possible to begin to reorganise the administration. In Scotland resort was had to the peculiar device of referring matters to the only body which might have been held to have any authority, namely, the Committee of Estates, which had been appointed by Parliament 10 years earlier and which had not met together since the summer of 1651, when they were captained by General Monck. Rather like the recall of the Rump Parliament in London, this body was recalled, and certain warrants for Crown grants after the King returned were directed to this Committee in default of any other body being available. Of course, after the King's return things were reorganised; the Great Seal had to be made, and that was not made in a day; matrixes had to be made. Officials had to be appointed before the administration could begin to work, and it was not until after that was done that the normal procedure could resume.

369. So, it would have been some period after 1660 when the normal procedure, by which I mean the pre-1650s procedure, could recommence? *A.* Yes.

370. You mention at the foot of the first page that after 1603 Royal approval by way of Signature was normally given by the affixing of a cachet? *A.* In Edinburgh.

371. But as far as any matter relating

to titles of nobility was concerned, the Signature of the Monarch personally was still required? *A*. Yes.

372. The attached Docquet was for what purpose? *A*. To make it easier for the King, or his advisers, to understand what it was about. I have explained the procedure of dealing with these normal Signatures. No one would have got the time to read the whole thing through, and it was a great advantage to the King and his advisers to have their attention drawn to the substance of the documents in a matter of a few minutes.

373. Let us look for a moment at the form of the warrant in the present case. Look at the foot of page 94. It begins by a reference to the King. All I am interested in at the moment is the back of the document, page 111, there half-way up the page there is the date 23 April 1662. What does the sentence immediately below that read? *A*. It is a reference to the sum of 100 marks in respect of his father's and his own known affections and sufferings for the King's service, which suggests that he was getting the thing at a cut rate.

374. Who were these other people? *A*. They would be the Commissioners of Exchequer.

375. There follows a docquet, and that appears to be signed by Lauderdaill. What post did he get? *A*. He had just been appointed Scottish Secretary in London to keep the King up to date with Scottish affairs and administration generally.

376. Whilst on that document, the first name on the list is Bellenden. Who was he? *A*. I have a note on that. He was Treasurer Depute who was associated with the Exchequer. He had been Sir William Bannatyne and he was elevated to the peerage as Lord Bellenden of Broughton on 10 June 1661. He appears as Bellenden which is the signature you are looking at.

377. *Chairman*.] What was the purpose of all these signatures? Why do all these names appear? Why should the Commissioners of Exchequer have to sign this documents? *A*. Presumably, because they acted corporately and it was not sufficient for one of them to act; they had to act corporately, in the same way as any board would act corporately.

378. Was it the practice for Commissioners of Exchequer to sign all Signatures? *A*. Indeed; I have seen many cases where they all sign. I think it is usual to find a clutch of signatures at the end of a Signature.

379. Lord *Scarman*.] I suppose they would have recommended the composition? *A*. The composition was in effect the fee paid for receiving the grant.

380. Is the composition lower than the going tariff because of the known affection and sufferings for the King's service? *A*. It is my impression that 100 Scottish marks is a small sum.

381. I would have thought it was a very low sum and the King would not have accepted it unless his Lords of Exchequer had recommended it? *A*. Correct.

Lord Scarman.] I suspect that is why they are all there.

382. Mr *Murray*.] As far as the procedure for getting to the stage of having this document signed by the various members of the Exchequer is concerned, would any of them have performed a revising function before the document was signed? *A*. They, or someone on their behalf, would do so; there must have been some revising fuction as far as the Signature was concerned, because the whole purpose of the Signature coming to London, in this case for the King's approval, was to give an opportunity for revision or reconsideration, so there could certainly be revision.

383. Lord *Brightman*.] Does the alteration to the date half-way down on the left-hand side suggest it was in London for some period before it was finally dealt with? *A*. Quite a number of signatures do have minor alterations.

384. You see the date has been changed from 1661 to 1662 *A*. That is a fairly intelligible correction. The

person who orginially wrote it had been mistaken about the date and had written 1661 in the thirteenth year of the King's reign and it was corrected to 1662, the fourteenth year of the King's reign.

385. Could he have written it in 1661 and it had been left lying on a desk for some time. *A*. That is what I suggest. The year began in Scotuand on 1 January from 1660 onwards, whereas in England it was not until 1725 that the year began from 1 January.

386. What was the date the year commenced—1 April? *A*. 25 March in England, which suggests it had been lying about.

387. It need only have been a month? *A*. With respect, this is a Scottish document.

388. Lord *Scarman*.] I suggest it was in the in tray waiting to be dealt with? *A*. Yes.

389. Mr *Murray*.] Can we look for a moment at the form which the Signature takes, because I think the Charter follows exactly through in the same order? Is that right. *A*. Yes.

390. It is perhaps easier to follow it in the English version. It begins with a recital, on page 94 again, of the persons who are the Lords Commissioners of thc Exchequer in Scotland, and we see a reference to William Lord Bennendyne in the bottom line of the first page. In your statement you have already made an analysis of the various portions into which the charter has to be divided. Taking it by reference to thc Signature, do we begin with a grant of specified subjects to turn to James, Earl of Annandale? *A*. With the lands of Johnstone.

391. Do the subjects which are specified carry on for rather a long time? *A*. Yes.

392. Until we get to page 100, eight lines from the end of the page, where the deed goes on to say: " . . . his Matie with advice and consent forsaid hes ratified approved and confirmed and be the tenor hereof ratifies approves and confirms the charter of vendition and aleination therein contained made and granted be the deceast Sir John Charters of Amisfield . . . " *A*. Yes.

393. That is referred to over the page until about the middle of the page? *A*. Yes.

11. Lord *Campbell of Alloway*.] What does " attour " mean? *A*. " Moreover '.

Lord *Brightman*.] That part goes on until when?

394. Mr *Murray*.] The middle of page 101. *A*. It goes on until " presents dispenses for ever ". I think it goes back to something else after that.

395. One has the words " quilks all and sudrie the saids lordships barronries ". Is that the clause which in the Latin text would be known as the *quaequidem* clause? *A*. Yes.

396. Is it so-called because it is a recital of how the subjects came to be in the state to which reference has been made? *A*. Quite so.

Lord *Templeman*.] Where are you?

Mr *Murray*.] Page 101, about the centre of the page, about 15 lines down ; the line begins with the word " Matie ", which is an abbreviation, and at the end of the line we see " quilks all and sundrie the saids lordships ", and about 10 lines lower down we see the words " specially constitute and patent letters resigned in the hands of his Matie and his predecessors immediat lawfull superiors of the lands and others abovewreatten puirly and simplie be staff and bastoun as use is att Edinburgh and togetther with all right title ", and, about 10 lines from the bottom, we see " comeing favours and for new heretable infeftment of the samen to be made and granted be his Matie and his perdecessors under their great sealls to the said deceast James now earl of Hartfell his heirs and assignayes and to the said James no wearl of Annandaill and Hertfell his heirs . . " The word " male " has been struck thorugh. ". . and assignayes forsaids heretably in dwe and competent forme as authentick instruments thereupon in the hands of Colein Hay William Hunter nottars pulict . . . ", and there is a blank as to the date.

397. Lord *Templeman*.] What is the reference to " resigned in the hands of

his Matie and his predecessors"? Is that a resignation of everything which has gone before, or a resignation of that which has come to him from his father? *A.* Everything which has been mentioned to date; that is the force of it.

398. There would be letters patent in the Exchequer, would there? *A.* No, with respect. Certain persons were appointed as procurators on his behalf in the letters patent to make the resignation; that is the force of it. The problem is the inversion of the order of phraseology. If you would be so good as to go back to the "quilks all and sudrie", to which attention has been drawn, it says 'quilks all and sundrie the saids lordships barronries milnes woods" and so on, which are held by them as a whole, "and were be them and their lawful procurators in their names to that effect specially constitute and patent letters resigned in the hands of his Matie". These procurators were appointed by the letters patent to resign the lands, and this says they were resigned in the hands of His Majesty "and his predecessors their excheq haveing their full power and commission to receave resignations", and it goes on to describe how the resignation was made, with the handing over of staff and bastoun; it indicates that there had been a formal instrument of resignation.

399. There will be two things: there will be letters patent in the Exchequer and the formal resignation of the resignor? *A.* Not quite. The resignor used letters patent in his own name to appoint his procurators to make the resignation. They then made a resignation which was solemnly recorded in an instrument.

400. That instrument would be held by the Exchequer? *A.* The instrument was what was entered in the Exchequer or minuted in the Exchequer book.

401. Does this mean it had been done or it was going to be done? *A.* It had been done.

402. So, all the lands he had solemnly appointed these chaps to be his agents for they had gone alone and resigned; there was some ceremony whereby they had gone along to the Exchequer and the Exchequer had recorded it had been done? *A.* Yes.

403. Is there any trace of those resignations relating to Annandale, or have they all disappeared? *A.* I do not recall seeing a notarised instrument narrating the resignation in the hands of the King. They are always referred to in the body of a subsequent charter.

404. They would be in the register? *A.* They would be minuted, or there would be an abridged record.

405. *Chairman.*] We are told that records of the Lords of Exchequer were probably burned in the fire of 1812. Is that right? I think there is a record of a fire.

406. Lord *Templeman.*] In your note dealing with this you say there was a resignation in 1657? *A.* Yes, but at the moment we are concerned with later matters. I have a note here at the bottom of page 94: "The Register of Resignations by Vassals from 1661 to 1682 . . . which consists of Minutes of Resignations in Exchequer by crown vassals in the hands of the Lord Treasurer or Commissioners of Treasury, representing the sovereign, contains an entry, under date 15 July 1661, to the effect that a procurator of Lord Annandale resigned the barony of Johnston and other subjects 'in favours of himself, his airs and assignayis'. This entry is correctly reproduced in *Annandale Evidence . . .*"

407. All these resignations were recorded in the register? *A.* Yes.

408. Lord *Scarman.*] The clause we are looking at is known as the *quae-quidem* clause? *A.* Yes—the one beginning in the vernacular "quilks".

409. *Chairman.*] The Barony of Johnstone is the territory resigned? *A.* Yes, one of the many parcels of property resigned.

Lord *Templeman.*] What happens after "Edinburgh" on page 101?

410. Mr *Murray.*] That is a reference to "staff and bastoun". *A.* As to the actual resignation, the reference at the end of page 101 is to "authentick

instruments taken thereupon in the hands of Colein Hay William Hunter nottars publict of the datcs", which are not specified. This is the instrument of resignation I mentioned.

411. Lord *Scarman.*] Would that be Mr Hunter whose accounts we have seen? *A.* I cannot say; Mr Peskett might answer it; it seems likely.

412. Lord *Templeman.*] If you look at all these surrenders, which have been made so they can be regranted by His Majesty, you see that the word "male" has been struck out. I take it that is struck out on the original? *A.* Indeed; this is a correct reflection of what appears in the Signature.

413. So, somebody has taken the trouble to strike "male" out from that passage? *A.* The word "male" does not appear in the Charter which follows on.

414. Lord *Brightman.*] Analysing the Signature, where does the resignation end? Where is the end of the resignation? *A.* It is about four lines from the end of page 101; it is the line beginning "at more lenth bears to the whilks resignations made in favours of the said . . ."

415. Lord *Scarman.*] At the very bottom we have that marvellous word "Attour". *A.* To be fair to the drafters, in the original these significant terms do appear in capital letters so you can spot the structure of the thing.

416. Mr *Murray.*] At the top of page 102 we move on to the next part of the structure, beginning with the word "Attour": "Attour our said soveraigne lord for the causses forsaids and divers others goods causses and considerations moveing his Matie of his certane knowledge and proper motive with advyce and consent above wreatten off new hes given granted and disponed and be this present charter confirmed . . to the said James earl of Annandaill and Hartfell and the heirs male lawfully gotten or to be gotten of his body whilks failzieing to his heirs female without division already procreat or to be procreat of the body of the said James earl of Annandaill & Hertfell and the heirs male lawfully to be procreat of the body of the said eldest heir female careing the name and armes of Johnstoun which they shall beholdin ever to assume & carry in all tyme comeing quhilks all failzeing the said James earl of Annandaill and Hertfell his nearest and lawfull heirs andassigneyes whatsoumever . . ." That is the limitation or destination of the property which is about to be referred to? *A.* Yes., that is correct.

417. Lord *Templeman.*] Is this what we would call in English a name and arms clause? Suppose you had a female who got married. Would she have to take the name and arms of Johnstone or lose the estate, or would it not have that effect? *A.* My impression is that this was the case, because there are numerous examples of people changing their names; it happened in Scotland.

Lord *Templeman.*] I do not think it is relevant to the problem here, but I wondered what the Signature might say on the subject.

418. Mr *Murray.*] I think the *novodamus* clause usually follows the destination; it refers in the next 15 lines or so to the lands above-mentioned. This is a regrant of everything previously described. *A.* Yes.

Mr *Murray.*] About 15 lines from the end of the page we have a line commencing "Hartfell", and three lines below it we see "and ffarther our said soveraign lord . . "

Lord *Brightman.*] Is that the first part of the *novodamus*?

419. Mr *Murray.*] Yes. It goes on to say: " . . and ffarther our said soveraign lord with advyce and consent for said of his Maties certane knowledge proper motive and princely power for the cause abovespeit and other good causses and considerations moveing hisMatie hes made united annexed erected creat and incorporat and be the tenor of the said charter makes units creates annexis erects and incorporates all and sundrie the lands lordships barronries brughes of barrorie teynds rights of patronage and others abovespeit with all there parts penlicles privileges and pertinents and others above exprest in ane haill and frie barronrie lordship and earldome regalitie justiciarie with free chappell and

chancellarie within the heall boundsmeithes and merches thereof to the said James earl of Annandaill and Hartfell . . " Are the words up to that point the words which create the territorial earldom which did not exist before that time? *A*. That incorporates all these subjects which have been detailed before into the territorial Earldom of Annandale and Hartfell.

420. It goes on with the words " with the title styll and dignitie of ane earl according to the date of the said James earl of Annandaill and Hartfell and his said deceast father their patents granted to them thereupon . . . " *A*. Yes.

421. It makes reference to " ordaining the toure and fortalice of Johnstoun otherways called Lochwood or Newbie to be the principall messuage of the said barronrie . ." What was the object of that? *A*. It was a matter of great convenience. One of the reasons for having all these properties incorporated into a territorial earldom was that if you had acquired by descent or purchase a variety of properties in many different parts of the country, as things stood if you were to become seised of it you had to perambulate round each one at which a piece of earth and stone would be handed to you. If you had the lot incorporated into a territorial earldom you could have the earth and stone handed over at one spot which would serve for the lot. That is the point of it.

422. It goes on at the top of page 103 to recite what the seiser will do, and about 10 lines from the top we see the words " And ffarder our said soveraigne . . ", and what follows is the creation of the Burgh of Moffat into a free burgh? *A*. Yes.

423. Together with the grant of a market day weekly on Friday? A. Yes.

424. Again, this was a new matter introduced at this stage in the deed? *A*. Yes. If I may say so, it was understandable in the circumstances of the time, because to have a borough on your property was something of a status symbol. It would not have been considered proper to incorporate the subjects into an earldom without creating a borough.

Mr *Murray*.] What follows about halfway down page 104 is what is called technically the *tenendas* clause.

425. Lord *Brightman*.] Is that part of the *novodamus*? *A*. No, after it ends.

Lord *Brightman*.] Where would the *novodamus* end—after the creation of the Burgh of Moffat?

Mr *Murray*.] Page 104, yes. It is about 12 lines down, beginning with thc word " annent ": ". . annent the whilks saisings and all that may follow thereupon his Matie with advyce and consent forsaid for him and his forsaids be the tenor of the said charter hes dispensed for ever to be haldin and to be had all and sundrie . ." There follow the matters covered by the *tenendas* clause.

Lord *Templeman*.] It is all relating to property.

426. Mr *Murray*.] To everything which has gone before? *A*. Yes.

427. Lord *Scarman*.] What does " *tenendas* " mean? *A*. " To be held ".

Mr *Murray*.] It is an indication of the way the property is to be held, and one sees at the bottom . . . .

428. Lord *Templeman*.] What is to be held? Is it " all and sundrie the lands lordships " etc? Is that the subject of the *tenendas*? *A*. Yes. If you look at the beginning of the *tenandas* clause, which is about 20 lines from the top of the page, you see a line commencing with the word " Hartfell ". Sometimes, what may confuse people is the construction, because in the middle of that line you see the word " to ". They used a rather peculiar construction, " to the said James "; we would say " to be held by the said James ". The word " to " might possibly be confusing, so if you read it as " by " it is clearer.

429. But the *tenendas* has no reference to the dignity of an earl; it is concerned with territorial disposition, is it not? Are there any words there which you can apply to a dignity as opposed to a territorial earldom? *A*. The territorial earldom is clear enough.

430. Mr *Murray*.] If you have a dig-

nity is it normal to make reference in a *tenendas* clause to the dignity? *A.* In other examples we have looked at in connection with this case, I do not recall.

431. After the *tenendas* clause there is a clause which is called the *reddendo* clause? *A.* Yes.

432. Can you tell us where that begins? *A.* After the point we have reached all the properties are recited at inordinate length. I am looking for the beginning of the *reddendo* clause.

Lord *Scarman.*] Does it go right to page 110? I notice that in the middle of page 110 the word " Attour " appears.

Mr *Murray.*] I think your attention has been directed to page 110, about 15 lines down, where it begins " Attour our said soveraigne ".

433. *Chairman.*] On page 105 there is a reference to one silver penny. A. That is where you have the payments; that is the *reddendo.* It begins on page 104 between half and two-thirds of the way down. There is a line containing the name " James earl of Annandaill and Hartfell "; the previous line ends with the words " give and yearly ". That is the *reddendo*—rendering yearly or paying yearly. That is without any revocation. It goes on: ". . give and yearly the said James earl of Annandaill and Hartfell to our said soveraigne lord and his Maties successors ffor the forsaid barronrie of Johnston . ." There are payments made for the various subjects going on for a very long time.

434. Lord *Scarman.*] Is it possible to have a *tenendas* and the appropriate *reddendo* and then another *tenendas* and another appropriate *reddendo*? *A.* It happens. Normally, in a simple charter, which nobody could say this was, you have a dispositive clause of *tenandas* and *reddendo* with the *testing* clause at the end, but the *reddendo* goes on and on.

435. *Chairman.*] It recites various silver pennies. *A.* I believe the *reddendo* ends on page 109, about 12 lines from the top; you see " Attour ".

436. Mr *Murray.*] What follows, prof. Donaldson, is a further grant of " the hereble office of the keeping and governeing of his Maties castle of Lochmaban ", together with the privileges attached to that; they appear to be dealt with separately? *A.* Yes, with certain dues pertaining to it.

Lord *Templeman.*] Page 110 seems to be compounding all the fees he may get for wardship for 600 Scots marks; it is the composition of wardship dues.

437. Lord *Campbell of Alloway.*] I am finding this a little difficult. We heard from Mr Peskett that you would expect a resignation of the title of honour. Have you found any part of this document dealing either directly or indirectly with such a matter? *A.* There is no specific mention of the title being resigned as far as I can see, but the *novodamus* can include subjects which are not resigned.

438. But we have heard in evidence from Mr Peskett, according to my note, that you would expect to see a resignation of the title of honour; it is the usual practice. Is there anywhere in this document, up to the reference to the silver penny, anything which directly or indirectly bears on the question of the signature of the title of honour? *A.* I think not, but I would have thought the point is that this confers a title of honour.

Mr *Murray.*] Because the part of the *novodamus* clause which has been looked at, which begins in the English text on page 102 with the words ' and flarther ", refers to something which is a new creation?

Lord *Templeman.*] That is what I call a leading question.

Chairman.] We will have to consider this as a matter of law. Expert evidence is uscful as to the practice of the times, but in the end it is a question of law.

439. Lord *Scarman.*] I have one point on construction. I am not asking you to construe the document, but the *novodamus* clause clearly grants a whole lot of lands and erects them into a territorial earldom with the same dignity, etc. I imagine that the words introduced by " with " are part of the grant of the *novo-*

damus clause? *A*. I think Mr Murray may want to enlarge on that.

440. I am not asking you for a strict interpretation; I am asking for your help as an expert witness. In the *novodamus* clause you have found some of the matters disposed of (I will not beg any questions by asking what is disposed of) introduced by the preposition "with" instead of the preposition "and"? *A*. It does not surprise me at all.

Chairman.] Mr Murray, would this be a convenient moment to adjourn?

Mr *Murray.*] Yes, my Lord.

Chairman.] Let us resume at two o'clock.

After a short adjournment

Chairman.] Mr Murray, we may get into some difficulty with time. A lot of what Professor Donaldson is to tell us is, I think, already in his written report?

Mr *Murray.*] It is, my Lord, yes.

Chairman.] Therefore, some of it you can take fairly shortly, I think.

Mr *Murray.*] I am obliged.

Chairman.] We have read this. I take it that you are concerned to see that members of the Committee become familiar with the important parts. However, we do not necessarily need to go through the thing in too much detail.

Mr *Murray.*] I shall endeavour to keep the matter confined, where I may, my Lord.

Lord *Scarman.*] Particularly where you come to the Charter, I think that all we really want to see are the essential disposing words in the Latin; I think we should look at them.

Mr *Murray.*] I am obliged.

441. If I may go on, then, Professor Donaldson, I think we had just looked at the bottom of page 102, at the English words in the Signature? *A*. Yes.

442. We have seen that the first thing that is done, under the reference to the phrase "And further", is the creation of the 'barronrie lordship and earldome", etcetera. When I say "etcetera" I am referring to regality and so on. What was the reason for the incorporation of the subject into an earldom? *A*. One reason, of course, which I did mention, is the convenience of having a single "sasine". But I think there may have been sometimes another reason for incorporating subjects in that way. An individual held a variety of properties some of which he had inherited, some of which he had acquired, and which may themselves have been held by different destinations. To bring them all together, to incorporate them in an entity of some kind—earldom or whatever—with a single destination, was clearly going to be a great convenience. There is also the point of jurisdiction which was mentioned. I do not think an earldom in itself conveyed a jurisdiction, but, of course, a regality did. Possibly the barony and regality are more important from the jurisdictional point of view than the earldom.

443. I think we can move now to the Latin text. I want to refer you to two particular passages in the Latin text which is here Document 2. The first is on page 250 where there is italicised on that page the words which I think are the words of the destination or limitation? *A*. Yes.

444. Looking at the Latin text as printed, the second line, after reciting titles, refers to: "*haeredibus masculis legitime de corpore suo procreat*"—I think it is—"*seu procreandis*". Is *that* the standard Latin text which is translated, if I can put it that way, in the Signature, simply by the words "gotten" or "to be gotten"? *A*. Indeed, "begotten or to be gotten". That is the standard phrase for translating "*procreat seu procreandis*".

445. If we go on in the following line —that is, line 8 of page 250 of the Latin text appended at the back of the bundle —in the immediately following line, beginning with the words "*Quibus deficientibus*", there is a destination to "*haeredibus femellis sine divisione*", then the word "*hactenus*" and then "*procreat*". What does "*hactenus*" mean? *A*. "*Hactenus*" means "hitherto" or "already" or "up to this point". This, it seems to me, is interesting and unusual. As I indicated, "*procreatis seu procreandis*" is the phrase

that would spring to one's pen or to one's tongue, but "*hactenus*" is unusual. As I recall, I do not recall seeing "*hactenus*" before. It seems to me to suggest very strongly that there was a difference; that the heirs female were already in being—certainly undoubtedly in being—whereas the heirs male may *not* have been already in being. It might have a bearing on the date of death of that young child.

446. Because if the word has any significance, it is drawing a distinction between the male succession and the female succession? *A*. It seems to me, yes.

447. The other passage to which I should draw your attention, as again being italicised, is on page 255. It is the second italicised passage which begins with the words "*Et similiter*". Do you have that? *A*. Yes.

448. Lord *Scarman*.] That is the beginning of a new clause, is it not? *A*. Yes.

449. Mr *Murray*.] The original clause of *novodamus*, am I right, began about line 12 from the top, just at the end of the previously italicised passage, with the words "*Et praeterea*"? *A*. Yes.

450. What we have here, therefore, are the words which begin by the erection of lands and so on into one—and I am reading about halfway down the Latin text—"*expressis in unam integram et liberam baroniam dominium comitatum regalitatem et justitiariam*". So that is the first thing that is done in the passage which is italicised, is that correct: that is, the erection of the lands into the earldom and so on? *A*. Yes.

451. Then it goes on to say "to James Earl of Annandale and Hartfell and his heirs and assignees" then "*praedict*". What is that? *A*. It is "aforesaid".

452. Then "to be called and for the all time future to be called" the "*comitatum*". That is "the earldom of" Annandale and Hartfell and lordship of Johnstone, is that right? *A*. Yes.

453. Then follow the words "*cum titulo stylo et dignitate comitis secundum datas diplomatus dict consanguineo et consiliario nostro Jacobo comiti de Annandaill et Hartfell et quondam ejus patri desuper concess*". What is "*concess*" short for? *A*. It agrees with "*diplomatum*". It would be "according to the charters granted thereon to our said counsellor and cousin Earl of Annandale and Hartfell and his deceased father".

454. The words to which I have just been referring begin with the words "*cum titulo stylo et dignitate*". You have looked at many charters in the 16th Century. Is the word "*cum*" followed by the ablative in use to make grants? *A*. Yes, it is in use regularly to make grants of all kinds. There is a note on this subject, in my statement. Could I draw attention to that?

455. Yes, indeed. Look at page 92 of your statement. *A*. I give certain examples there of the variety of things which could be conveyed, as I take it, by "*cum*". Yes, page 92: "In the Annandale charter of 1662 we have 'una cum officio coronari lie colonellship'—the office of coroner" is conveyed. This is just in the middle of page 92 of my statement: "'una cum'". Later on you get "with the heritable office of keeping and governing our castle of Lochmaben". These are offices conveyed by "*cum*". I point out how, in another charter, the same thing is expressed by an accusative. So there is not the slightest doubt in my own mind, leaving aside other peerage charters, that "*cum*" or "*una cum*" is completely effective as a dispositive expression; it dispones. There is no difference between the dispositive force of a noun in the accusative and the dispositive force of a noun in the ablative preceded by "*cum*", and that is leaving aside actual peerage cases (of which I can cite three).

456. Lord *Brightman*.] These are cases where the peerage has been created by the use of "*cum*" and the ablative, is that right? *A*. That is so.

457. Mr *Murray*.] Which are those three, Professor? *A*. Ochiltree 1615, which is amongst the documents of which an abstract is printed in——

458. *Chairman*.] Let us have the names of the three first, can we? *A*. It is Ochiltree 1615, Crawford 1648 and Airth 1680.

459. These were instances where there had been no peerage dignity of that name *before*, and these peerage dignities were granted—correct me if I am wrong—in charters which also contained a grant of lands, is that right? *A*. May I take them one by one, my Lord Chairman?

460. Yes, please do. *A*. If you could look at page 13 of the appendix (if that is what it is), where there is a whole batch of——

Mr *Murray*.] It is the immediately-following part to Prof. Donaldson's evidence, my Lord. It is the part headed "Illustrative Charters", page 13 of that.

The *Witness*.] "Lordship of Ochiltree Charter 1615". What we are producing here is a page from the printed Register of the Great Seal. Of course, that consists of abridgements. However, I understand we have here a photocopy of the original Register, and it is from the original Register that I give you the very words. If you look at this item 1248, lines 8 and 9 or thereabouts, it says: "*cum omnibus honoribus et titulis*". That is the language of the abridgement, but the language of the original is in fact slightly expanded, though without any change of sense. If I may dictate: "*cum omnibus honoribus titulis dignitatibus stylis praerogativis immunitatibus privilegiis ad idem pertinentibus*". You will observe from the reference at the end of that printed entry that this is engrossed twice over in the Register of the Great Seal. On the second occasion on which it is engrossed there is a very, very slight difference of terminology, but again without any change of construction or meaning: "*cum omnibus et singulis honoribus titulis stylis praerogativis immunitatibus privilegiis liberatatibus ad dictum dominium spectautibus*". That is what the Charter says. The previous item, on page 12, shows quite clearly that this did have the effect of creating a hereditary lordship.

461. *Chairman*.] Where did you obtain this letter? *A*. This is in the print from the Council Register, just below the middle of that, on page 12: "may injoy all the honnouris, digniteis, and previledgeis belonging to the Lordship of Uchiltrie, in als large and ampill maner as the said Lord might haif dons befoir his dimissioun, to continew with with him and his posteritie" and so forth.

462. What had happened to this title in dignity of Lord Ochiltree? When was it originally created? *A*. It had subsisted for several generations in a Stewart family. Some mischance had occurred, I suppose, and at this point it is granted afresh to another Stewart, Sir James Stewart of Killeith. If you go back, if I may direct you, to page 13, in the second column, ten lines or so from the top of that second column, it explains that these lands, which were formerly lands which belonged to Andrew Lord of Ochiltree "and which the said Andrew, Andrew master of Ochiltree, his eldest lawful son and George Crawfourd foedatarius of Lefnoreis, with the consent of Dame Margaret Keith lady of Blairquhan mother of the said lord, and Lady Margaret Kennedy spouse of the said lord, and Lady Anne Stewart spouse of the said master, resigned; and which the king incorporated in a free lordship and barony of Ochiltree, ordaining the principal messuage".

463. Lord *Templeman*.] I am terribly sorry, I am lost. I am on page 12. *A*. That is on page 13, my Lord, to get the previous history of the subject. This explains that they had belonged to this previous family who had resigned them, and they are now granted to Sir James Stewart of Killeith, with the title.

464. Lord *Campbell of Alloway*.] It is the second column, is it not? *A*. The second column.

465. Lord *Brightman*.] What do you say the document at page 13 is called? It is not a Signature, is it? *A*. No, 13 is a printed abridgement of the Charter from the Register of the Great Seal.

466. Mr *Murray*.] Perhaps you should explain, Prof. Donaldson, were printed abridgements of these Charters made, I think, in the last century? *A*. In the last century. That would be done about 1890, I would say.

467. *Chairman*.] However, you have looked at the original? *A*. I have looked at the original, and the quota-

tions I gave you were from the original manuscript.

468. So it seems that here these lands had been resigned by certain people—we do not quite know why—and now they are being granted anew to James Stewart of Killeith, is that right? *A.* Yes, with the titles.

469. He personally never had the title of Lord of Ochiltree before, but he is getting it now? *A.* That is so.

470. Lord Scarman.] He got it under the words "*cum omnibus honoribus et titulis*"? *A.* Indeed yes, my Lord.

471. Nothing more specific than that? *A.* Nothing more specific than that; nothing more on record than that.

Lord *Scarman.*] Yes, I follow.

472. Lord *Templeman.*] Is 13 to give effect to 12? *A.* I do not know that it was designed to give effect to it. It expresses how effect had been given to it.

473. That makes it clear that it was the title, does it not—page 12? Lord Ochiltree, being about to go off to Ireland, desiring his place and estate might continue, has chosen Sir James Stewart (he and his sons being, as it were, dead in his kingdom) as next in race to succeed him, coming by way of succession as well as by purchase; then giving him the honour, dignity and privileges belonging to the Lordship of Ochiltree? That is plainly a title? *A.* It explains why he resigns the title.

474. Lord *Scarman.*] This is a Royal Letter to the Privy Council? *A.* It is a Royal Letter to the Privy Council, yes.

475. Is is making it absolutely plain that the dignity is going, as well as everything else? *A.* It has been, in effect, transferred by resignation and regrant.

Lord *Scarman.*] It says: "oure pleasour is, after the said lord hath surrenderit in his favour, that immediatlie you accept the said Sir James in his place", etcetera etcetera.

Lord *Templeman.*] Then on 13 he gives it to him: the land, the dominium and the barony of Ochiltree, united in one dominium and with all the titles. Then it sets out the land that goes with it.

476. Lord *Scarman.*] Really, all this is doing, Professor, is that it is showing us that there are many ways in which these dispositions can be made. They can be made so-and-so, so-and-so. They can be amplified, they can be made much shorter, much more general. The ablative can be used preceded by the preposition "cum" and so forth. So it leaves it open to us, when we come to the Signature and the Charter that *we* have to interpret, really to give it the sense that seems to be appropriate in the context and in the circumstances. That is really what it is, is it not? *A.* Yes.

477. You, of course, are not going to tell us how to interpret them? *A.* Well, my lord, this is one example. You see, there are two others.

478. You may be telling us how to interpret it, but I think we should think that that was our job. *A.* Would you wish me to draw your attention to the other two peerages?

479. Yes, I would like your comments on them. *A.* You do want that. One is Crawford 1648.

Mr *Murray.*] My Lords, this has been produced as an extra photocopy. It is taken from the Minutes of the earlier Proceedings.

The *Witness.*] So there is a complete printed version there.

480. Lord *Campbell of Alloway.*] Could we be told the gap of generations on these examples? It could be relevant in this case, where the gap is so small between 1661 and 1662. Could we have some indication of the gap in the generations, between the original grant and then the regrant? *A.* I am sorry, my Lord, I do not quite follow. Do you mean you want an example nearer 1662, of this kind of thing?

481. No. We had the first one of Ochiltree, and you said there were several generations' gap between the first grant and the regrant. We know that two individuals hold separate destinations

Cassillis ease. However, what would help me pcrsonally is if you could give us the gap between the first creation and the second, and then the resignation and the seeond generation. *A.* I do not recall precisely when Ochiltree had been ereated, but it had been held for several generations before the original resignation took place in 1615.

482. Is there any example that you have at all, in your mind or in these papers, where you get the original creation of grants and then a *novodamus* within a very, very short period of time? *A.* I do not rccall an example within a very short period.

483. Is there nothing like that, no thing fairly comparable? *A.* I do not reeall one.

484. I am only delving into your expertise, because I am foxed. Is there anything fairly comparable, but not perhaps as comparable, to what is happening in this case, in all your researehes? *A.* Crawford certainly was a very old title indeed. It would not meet your requirements, I am afraid. I cannot lay my hands on Crawford.

485. Apart from anything in the papers, from your great experience, are you aware of anything broadly comparable to what has happened here, in this ease. *A.* Comparable to the two successive grants in two successive years?

486. Yes, precisely. *A.* Not with a resignation eoming in. You do find Letters Patent and a Charter fairly close to each other, but with the same destination and not with a resignation intervening. That does not meet your case, I am afraid.

Lord *Campbell of Alloway.*] So when it really comes down to it, this is a one-off situation without prccedent, and we have to do the best we can.

Chairman.] In the meantime, what we are on is the significance of the subject in the ablative, introduced by the preposition "*cum*", so I think we had better deal with that and get it out of the way. You want us to look at the Crawford case.

487. Lord *Templeman.*] Before you do that, on Airth, Airth was a Charter, was it not? *A.* I beg your pardon, my Lord?

488. It is the Airth one you have just been showing us at page 37. If you look at thc Docquet at the bottom of page 39 it says: "these eontaine your" majesty's "warrant for a charter to be past" and so on and so forth, "which were formerly erected . . . conform to the charter latcly granted by your" majesty "to the said James marquis of Montrose and his foresaids of the same under your" majesty's "great seale of the date" 1680. So it looks as though this was another case where there was a grant of the title to start with, and then another grant—which was this— of a Charter whieh followed it, is that right? *A.* Yes.

489. Then I do not understand how we can possibly deduce from it that it is this document which is granting the titlc? *A.* This is a particularly interesting case, my Lords—this Airth business. If you look first of all at page 38, which is part of the Signature, right at the foot of page 38, the Signature intended that there should be a conveyance made of the title—six lines from the foot of page 38—"together with the style title of honor and dignitie of earl of Monteith and Airth lord Kilpunt and Kilbryd with all honors precedencies liberties and privilcges perteining and belonging" thereto "in any sort". Those words have been deleted, and they were deleted in response to representations by the King, which you will find in a letter—it follows, I presume—on page 42. If you look at page 42—and this is very significant about the whole proccdure—on page 42 Charles II writes to the Exchequer objceting to the inclusion of the titles in the grant. About seven lines from the eonclusion of the lcttcr, five lines from the end of the main paragraph of thc lctter, you will find it stated that the King's wish is "to delete the clauses relating to the disposing of the said earles titles of honour to the end they may remaine in the same state which they were in before the said late disposition, but as to all other things contained in the said signature particularly the regalityes we doe require you to pass" the "same without delay." In the Charter, which also is here, the titles are not mentioned. I

take this all to mean that in the Signature the force of the phrase "together with all titles and honours" and so on would have been sufficient to confer the dignity, to confer the title, the earldom. The King objects and says, "I don't *want* the earldom to be conferred." The Signature is therefore altered, and the title is *not* in fact granted. As I take it, in the Signature the phrase "with the title", etcetera, etcetera, was intended to have the force of conferring the dignity.

490. *Chairman.*] At all events, you would say that contemporaneously the King, or his advisers, took the view that the manner in which this was expressed would have been apt to have carried the title? *A.* That is what I think, my Lord, yes.

Mr *Murray.*] It was in fact a transference of not only the landed estates, but also the proposed transference of the title to the Marquis of Montrose, so it was a passing of the title to a complete stranger.

491. *Chairman.*] Who had had the Earldom of Monteith and Airth before this; in fact, who continued to have it (if anyone)? *A.* Airth had been held for generations by a Graham family. It was proposed at this stage that they should get something more. There was a royal prejudice against the title "Earl of Monteith", because it was believed to convey some kind of claim to belong to a superior, senior branch of the Royal House. In 1633 the Earl of Monteith was deliberately demoted to the Earldom of Airth, so that he would not have this obnoxious title. I think the same thought lay behind this transaction in 1680. Charles II did *not* want an Earl of Monteith.

492. Was there an Earl of Airth at the time? *A.* Yes, Earl of Airth, 1633.

493. Had this passed by 1680 to the Marquis of Montrose? *A.* By a rather peculiar transaction, between Montrose and Airth, it was intended that Monteith should pass, and the King put his foot down. That is the substance of the rather complicated procedure.

494. Mr *Murray.*] We have, at page 15 in the print, the Charter of 1633 whereby the Earldom of Airth itself was created. It is a very abbreviated version is it not? *A.* Yes. That was when he wanted to be Earl of Monteith. Indeed, he *was* Earl of Monteith, but he was demoted to Earl of Airth.

495. But he still had, I think, if you look at it—it is a very short passage—"the lands and barony of Airth were erected into an earldom of Airth to which the earldom of Monteith was joined", is that correct? *A.* Yes.

496. William, the then Earl of Monteith, was created Earl of Airth? *A.* Earl of Airth, yes, but retained his precedence as Earl of Monteith.

Lord *Campbell of Alloway.*] What record is this?

Mr *Murray.*] This is page 15, my Lord, of the same bundle.

Lord *Campbell of Alloway.*] Yes, but where does it come from?

497. Mr *Murray.*] Can you help, Professor? *A.* It is from the Register of the Great Seal.

498. Lord *Templeman.*] That is 1663? *A.* Yes.

499. Am I right in thinking that the Docquet on page 39 confirms to His Majesty that the Charter which begins at page 37 conforms to the Charter lately granted by His Majesty to Montrose "under the great seale of the date" blank "of" blank "16", which we have not got? *A.* Yes.

Mr *Murray.*] Again on page 40, about ten lines down, the Docquet there, having recited the names of the lands, has the phrase "together with the stile title".

Lord *Templeman.*] Yes, but unless we have the earlier Charter, we do not know if we have the title already, as we know in the present case there was a 1661 Charter to the title, followed by the lands. This is expressed by a Docquet saying, "You are granted", at the start of page 37, something which conforms to a Charter already granted. So in that case we simply do not know whether the word "*cum*" meant "*cum*—with all I have already given you", or "*cum*—with what I am now giving you today". However, I need not labour the point. We have got to construe the documents we have got in front of us. I, for my part, do not find anything in the Airth case, least of all any construction which favours your construction.

Chairman.] I think, Mr Murray, the point that you are trying to make at the moment is that there are a number of very respectable precedents for using "*cum*" with the ablative, in the grant of a peerage dignity.

Lord *Templeman.*] That may be so, but Airth is not one of them, or it may not be one of them, because we have not got the preceding Charter.

Chairman.] It may have been one of them, if the King had not insisted on the striking out of the Charter.

Lord *Templeman.*] No, it is page 39. The whole of the grant has got to be in conformity with something he has already given. That is why the date is left open. So until we see that grant, we do not know whether the title had already been created, as it had been created in the instant case in 1661.

500. *Chairman.*] Do you want to look at the Crawford case? *A.* If I may.

501. I understand the papers are not before us yet, is that right? *A.* My Lord, Crawford is printed and is, I take it, in your hands.

Mr *Murray.*] It was handed out yesterday, my Lord, is my understanding.

The *Witness.*] It is from the old Annandale Minutes, page 620.

502. Lord *Scarman.*] Is there a reference to the Crawford case in your report, or annexed to the report? *A.* I think not. It was drawn to my attention later.

Lord *Scarman.*] I had been expecting the Professor to refer to the Cassillis case.

Lord *Campbell of Alloway.*] It is at the end of this document.

503. Lord *Scarman.*] Can I understand the relevance of the Cassillis case? The Oxfuird case does not seem to help at all. On Ochiltree, I take the point. However, I think my learned noble Friend may well be right. I did not get much help from that. *A.* I did not think Cassillis was as good a case for the force of "*cum*" as those other three which I mentioned.

504. The interesting thing in the Cassillis case is that the *novodamus* clause included the peerage dignity; that is right, is it not? *A.* Yes.

505. We do not have that inclusion in the Annandale case, do we? *A.* No. Could we dispose of Crawford?

Lord *Scarman.*] Yes.

Mr *Murray.*] Perhaps we might take them one at a time, my Lords; it might be helpful.

506. *Chairman.*] Is it part of this document which starts with the Act of Ratification? *A.* If you find Crawford, it is page 622. Crawford begins on page 620; number 281, page 620.

507. Lord *Campbell of Alloway.*] It is the Charter granted to John, Earl of Crawford and Lindsay? *A.* Yes. On page 622 there is a passage in italics, at about the middle of the page. Here we have, if I may translate: "All and whole the lands and barony of Pitcruvie", then there is an omission.

Lord *Templeman.*] Where are we?

Mr *Murray.*] Page 622, my Lord, of the bundle of papers handed to you yesterday.

Lord *Templeman.*] It begins with the Act of Ratification?

Mr *Murray.*] It begins at page 620, but the passage to which your Lordship's attention is being drawn is on page 622.

508. I think you are translating, Professor? *A.* Yes, I was translating it, if your Lordships have now found the appropriate page.

Lord *Templeman.*] Mr Murray, it is not entirely my fault, it is nobody's fault, but, as happens sometimes, the top, which gives the number of the page, has been cut off. However, I have tracked it down now.

The *Witness.*] There is a slab of about six lines of italics in the middle of the page.

509. *Chairman.*] It says "*unacum cognomine*"? *A.* Yes, "along with the surname designation title honour and dignity of the said Earl of Crawford and Lyndsay and all privileges pre-eminences immunities rights and honours whatsoever pertaining thereto in any way"—

I cannot get the last word on the line, which is very faint, "*sub*"—"under express reservations limitations and other conditions and provisions respectively under-specified in the manner underwritten alone and not otherwise". So this, it would appear, is another clear case of the title being governed by the "*cum*"—"*unacum*" in this case. In the same document, at the foot of the following page, which is 623, about eight lines from the foot of the page, it is the same phraseology really: "all and whole the same barony of Pitcruvie etcetera . . . along with the name designation title honour and title of honour of Earl of Crawford and Lindsay and all other privilges pre-eminences and immunities", etcetera, etcetera, with a reservation. So that is the third case in which a peerage appears to be conferred by a phrase introduced by "*cum*" or "*unacum*".

510. Had this title been resigned, along with the lands, before this Charter was granted, or what? *A.* I think it must have been, because there is an enormously long entail here; the entail goes on for pages.

511. Lord *Templeman.*] Can you show me any land that was granted by this Charter? *A.* Actually, for the convenience of the reader, I suppose, because the interest was not in the lands, most of the lands had been dropped out, and that is why we had "*Totas et integras terras baroniam de Pitcruvie*" with omission marks. The omission marks, I suggest, may cover a long catalogue of lands, such as we had in the Annandale one.

512. Lord *Scarman.*] It describes really the "*Totas et integras terras*"? *A.* Yes.

513. Lord *Campbell of Alloway.*] When was the first grant? *A.* We get the story of the resignation on the following page.

514. Yes, but the first grant, prior to the resignation. *A.* The Earldom of Crawford is one of the oldest earldoms in the country, so the original grant must have been very, very early indeed. He certainly was not a recent creation at that time.

515. Lord *Templeman.*] Which page is the resignation? *A.* Page 623, I think. Yes, page 623 where there is a big slab of italics.

516. Lord *Scarman.*] Starting with the "*Quaequidem*"? *A.* Yes, as usual: "Which lands, baronies, etcetera, formerly pertaining, and which lands, baronies, tenancies, etcetera, were resigned by John Earl of Crawford and Lyndsay in the hands of the said Lords of our Exchequer of our Kingdom of Scotland having our power to receive resignations", and so on. It gives the date of the resignation, the 1st March.

517. *Chairman.*] Does it actually bear out that the earldom had been resigned? *A.* I think it is parallel to the Annandale case. The earldom is not specifically mentioned, but all the subjects are lumped together as having been resigned: "offices, patronages of churches and other particularly above written with pertinences or resigned". But remember, if I may say so, the title has already been mentioned in the earlier part of the document.

Lord *Campbell of Alloway.*] Was the title resigned? I suppose it is a matter my Lord Chairman, for us, but I do find it frightfully difficult to follow, if one does not really know whether, as a matter of fact, the title was resigned or not, in effect, from the facts of this document.

Chairman.] Subject to anything we may be told later, I do not think there is any help we can get from this document, because we do not know precisely what the situation was at the time, and it is probably enough trying to construe he Annandale deeds, without having to construe a lot of others as well.

518. Mr *Murray.*] The purpose for which you drew the attention of their Lordships to this, Prof. Donaldson, is that the transference of the title or the conveyance of the title is perfected by the word "*unacum*" followed by the words or style to which you referred? *A.* That is the point, yes.

Chairman.] It may or may not be, depending on the background, I think.

519. Mr *Murray*.] Would you go back for a moment, please, to pages 40 and 41 of the appendix relating to the Airth peerage, having regard to some of the questions which were being put to you earlier? On page 40 do we see —this is part of the Docquet, about twelve lines from the top of that page, a reference to a series of lands " together with the style title of honour and dignitie of earl of Monteith and Airth Lord Kilpunt and Kilbryd preceding upon the resignation of the said Willian earl of Monteith " ; do we see that? *A*. Indeed, yes, I do. I have it.

520. Do we see that later on, immediately below that, it is James Marquis of Montrose in whose favour the resignation is purported to be made? *A*. That is right, yes. Airth was resigning in favour of Montrose, for special private reasons, I think is the simple explanation.

521. You see, I think it was being suggested to you by my Lord Templeman that Montrose already *had* these titles. *A*. No, he certainly did not.

522. Thank you. On the immediately opposite page—page 41—do we see there that what the Docquet suggests, about eight lines from the top of the page, is: " & approves the conveyance made by the said William earle of Moneith in favours of the second son to be procreate of the said James marquis of Montrose his body with the quality & provision above mentioned and when he exists your " majesty " wills & declares that he shall bruik use & enjoy the title of honour & dignity of earl of Monteith & Airth ". So that again the object appears to have been that Montrose was to have these titles, but they were then to pass not to his eldest son, but to his second son? *A*. Yes.

Lord *Campbell of Alloway*.] What did he have before?

Mr *Murray*.] Before that, the Marquis would have had a string of titles in the Montrose peerages, which would no doubt all be going to his eldest son.

523. Lord *Campbell of Alloway*.] They were not resigned in order, so to speak, in exchange for this, is that right? *A*. Not resigned by Montrose, my Lord, because he did not *have* them; resigned by Airth in favour of Montrose.

524. That is right, but what did Airth have before, and when was the original grant? *A*. Airth had had his earldom since 1633.

525. *Chairman*.] The position was that William the Earl of Montieth and Airth resigned his titles, and this was a proposal that they be granted to James Marquis of Montrose and his second son and heir to his body, is that right? *A*. Yes.

Chairman.] If they *had* been granted, if the Signatures received effect, it would have become titular, etcetera. I think that is the only point that is sought to be made here.

526. Mr *Murray*.] Prof. Donaldson, can I ask you, have you also considered the question of other charters at about the period at which the Charter which you are presently considering was granted, which dealt with territorial earldoms only? *A*. Yes. Part of my statement relates to a very brief account of the various patents for the grant or regrant of peerages. This refers to certain grants which were granted, of territorial earldoms only.

527. That is on page 8? *A*. That is right. The second head there relates to the second outstanding example, the Earldom or Orkney, where a territorial earldom is conferred in April 1662, but no title was conferred with it.

528. I think that we see the relevant document in the immediately following section of the bundle, page 31 If you look on to your bundle, you will see it. I beg your pardon, page 32. *A*. Page 32? This is a very abridged passage from the Signature and the Docquet explaining quite clearly that this is a purely territorial grant and no title passed with this Charter. So that could happen.

Lord *Campbell of Alloway*.] What does that show? How does it help? I am not trying to be difficult, but I am getting very lost and am finding it difficult to follow.

529. Mr *Murray*.] Does that suggest—if I may lead the witness on this—that where the conveyancers were concerned to grant only a territorial earldom, they did *not* use any words which were related to a title of honour? *A*. It was possible to grant a purely territorial earldom.

Mr *Murray*.] If one looks at Aboyne, which is at pages 30 and 31, there are other cases in which the territorial earldom was granted to someone who in fact did have a peerage dignity, but again there is no reference to a peerage dignity being conveyed in the Charter which relates to the territorial earldom.

Chairman.] It look as though Charles Earl of Aboyne had the earldom already, and now he got the territorial earldom.

Mr *Murray*.] Indeed.

530. We know, do we not, Prof. Donaldson—this is page 65 of the Petition—that he was granted the peerage dignity in September of 1660? *A*. 1660, before he got the Charter of the territorial earldom, yes.

531. I think that the Argyll case, to which you make reference and which is also in the papers, is one of the same pattern? *A*. Yes.

532. So that what these demonstrate—and you have been through these—is that there is no reference, by "*cum*" or in any other way, to the title, style or dignity, in the cases of persons who already had a title or dignity, to whom lands were, by a charter, granted and erected into a territorial earldom, is that right? *A*. That is correct.

Mr *Murray*.] Now, Prof. Donaldson, could you help me in another matter altogether?

533. Lord *Scarman*.] Before you go into another matter, I am a little bit worried about one passage in the Professor's report. I would like to put it to him. Professor, would you look at your report? I think it is page 92. That is the page where you deal with the argument about "*cum*", do you not? *A*. Yes.

534. At the very bottom of the page you conclude: "On this reasoning, that the dispositive force of the charter applies indifferently to subjects in the accusative and those in the ablative". I would have thought, having listened as best I can to the last 45 minutes of analysis of other peerages, that that might be putting it a little bit too high. Would you accept at any rate *this* formulation? It is an Englishman's formulation, and I would be prepared to go this far, but I am not sure I would be prepared—unless you can persuade me—to go further. In a disposing clause, the preposition "*cum*" is apt, unless the context indicates otherwise, to include within the disposition the matters which the preposition introduces into the clause? *A*. Could I ask you to repeat that, my Lord?

535. Indeed. This is put in English the origin of which is a long way south of the border. I will do it again. In a disposing clause—or, you might say, in a disponing clause, but you know what I mean—the preposition "*cum*" is apt, unless the context otherwise indicates, to include within the disposition the matters which the preposition introduces into the clause? *A*. Yes. I do not recall a case in which that qualification you introduced has taken effect, unless——

536. You may *not* recall a case, but would you suggest that we, construing the words of the King, would be entitled to leave out the words "unless the context otherwise indicates"? *A*. I find it hard to think of words in which the context would make that impossible, given the force of "*cum*".

537. So would I. Since I have moved into a very strange world where my imagination has been put at full stretch during the last two days, I am prepared to construe that there are situations within the history of the Scottish peerage, which no amount of imagination could have imagined if they had not occurred! *A*. I think all I can say is——

538. You would accept that? *A*. I beg your pardon?

539. You would accept that that is possible? *A*. I suppose so. I would

be interested if a case could be drawn to my attention. I have not come across one.

540. You would demur over "unless the context indicates otherwise"; you would think that there could not be any cases in which the context would? *A.* Candidly, I cannot envisage one, my Lord.

Lord *Scarman.*] That is fair enough, yes. For my purposes, that is enough.

541. Mr *Murray.*] Is the position which you are taking up, Professor, on your analysis of this Charter and many other charters, that in respect of what has been called a disposing clause, it is a matter of indifference whether subjects are disponed (obviously, other than the very first subject mentioned), by the use of some such word as "*et*" and the accusative or by "*cum*" and the ablative? *A.* In my own work as an editor of the Register of the Privy Seal —which, of course, is very often duplicating the Register of the Great Seal, it is almost similar—I cannot notice any case in which there is any different force between the accusative and the "*cum*" with the ablative. The scribes seem to use them quite indifferently.

542. Thank you. On page 90 you refer to the Cassillis case. You there reproduce certain of the language taken from the Cassillis Charter of the 24th April 1671? *A.* Yes.

543. I think that we see there that there is a grant which you preface as "according to a charter of 1642", and then the Latin words which perhaps you should translate to the Committee. *A.* Which words?

544. In paragraph 1. *A.* Yes, "*cum titulo dignitate*" you mean?

545. Beginning with the words in brackets. *A.* Yes, "*dedisse*": "understand, know ye, that we have given to John Earl of Cassillis and his heirs"—I am not specifying them—"the Earldom and Lordship of Cassillis and all lands teinds and others underwritten, namely" ("*quequidem*") "which are all united into one Earldom and Lordship of Cassillis, with the title dignity precedence and priority", or "pre-eminence", "pertaining to the said earl and his predecessors by the law and practice". Sorry, I said "pertaining"; "*debita*", "due to the said earl and his predecessors by the laws and practice of this our realm according to a charter by Charles I, dated 29th September 1642", "*et similiter*". It goes on to certain additional lands. Is that the page you meant?

546. Yes. There, am I right that the phrase "*cum titulo*" is intended to be descriptive of the lands which are all united: "*quequidem . . . sunt omnes unita . . . in unum . . . comitatum*"? *A.* Yes, the King says he has given all these lands "united in an earldom with the title dignity, etcetera, pertaining, due, to the said earl and his predecessors".

547. In fact, reference is made to the Charter of 29th September 1642? *A.* Yes.

548. Of which I think an abstract is printed here? *A.* Yes.

549. It is page 28. Unfortunately, it is possibly reproduced the wrong way round, so that page 29 comes first? *A.* Yes, page 29 comes first.

550. It is on page 29, in the middle column, that after a very long recital of lands we have, do we not, the phrase "and which lands, etcetera, of Dunure and so on the King has created into a barony of Dunure, and others into a barony of Leswalt, and all into the earldom and lordship of Cassillis"? *A.* Yes.

551. There is no mention in the abstract of any title or dignity, at that stage? *A.* Yes, that is so.

552. I think that you looked at the full Charter? *A.* I did.

553. There is no reference to a title or dignity there? *A.* This appeared to me a grant of a territorial earldom.

Lord *Scarman.*] Yes, I should think so.

554. Mr *Murray.*] I think that we know that the 1642 grant did not proceed in any event upon a Royal Signa-

ture, so that even if there had been any reference to a title in it, it would have been ineffective to create a title? *A.* With respect, the Signature is not extant.

555. Let me put it this way. We know that in the Committee of Privileges in the 18th Century it was held that this had not passed the signature, and we see the words at the top of page 28 "*Apud Edinburgum*", do we not? *A.* Quite so.

556. What would you draw from that? *A.* I draw from that the conclusion that it——No, I am not so sure about this, but you *might* draw this conclusion. I would not be conclusive about this, but I think it is reasonable to draw the conclusion that this had not gone to London; that this had been dealt with by the Cachet in Edinburgh and not gone to London for the signing.

557. Lord *Campbell of Alloway.*] Is there a resignation? I cannot find the resignation. *A.* Yes indeed, my Lord, in the middle of that column, the second column on page 29: "*quas idem comes resignavit*".

558. Where is it—about 10 lines down? *A.* About 15 lines down from the top of the middle column.

Mr *Murray.*] Immediately before where I started reading before, my Lord.

559. *Chairman.*] There we are, then. We get the Charter first, granting a territorial earldom in 1642, then later on, in 1671, a peerage dignity for the name of Cassillis being granted to him, which creates precedence as from the grant of the territorial earldom in 1642, is that right? *A.* That appears to be so. yes.

560. There was no Earldom of Cassillis before 1671, is that right? *A.* Yes, there had been an Earldom of Cassillis since about 1500.

561. I see. But what had happened to it? Had it been forfeited or become extinct or resigned, or what? *A.* He must have had some reason, in 1642, for resigning, for a fresh grant of the lands, yes.

562. Did he resign in 1671 for a fresh grant of the earldom? *A.* Yes, indeed, my Lord.

Chairman.] If it was created centuries before, why was he only given fresh precedence from September 1642? There are a lot of mysteries here which probably we have neither the time nor the need to investigate. I hope we are not going to find ourselves in a process of trying to resolve this matter *obscurem per absurdias*", since really we are not in obscurity about the other charters that we have been looking at.

563. *Lord Scarman.*] The one thing that *is* clear, I think, is that in the *novodamus* clause, in the Cassillis case, there is a new grant of a territorial earldom with peerage dignity, peerage dignity being the earldom. That is a regrant of something that had existed before and had been resigned or otherwise terminated. That is right, is it not, Professor? We get that far, clearly? *A.* That is so, yes.

564. I do not know that we need go further than that. *A.* I am not sure if this Charter of 1671 is to be read specifically as granting precedence from 1642. If you read that phrase which I read—"with title dignity, etcetera, due to the said earl and his predecessors by the laws and practice of this our realm according to a charter by Charles I"—it does not seem to me to state specifically that the precedence dates from that Charter of 1642. The precedence may go further back, I should have thought.

565. *Chairman.*] It is you who put in the 29th September 1642? *A.* That is the date of the Charter, yes. Oddly enough, the 1642 Charter does not, as far as I have been able to discover (and I have examined the original), say anything about precedence.

Lord *Campbell of Alloway.*] Yes, but they use this form of words "according to the date of the charter" here, according to the date of the precedence which is adopted in the present case, and it is said it shows a backdated precedence.

Mr *Murray.*] My Lord, it may be appropriate to interrupt at this point to say that in discussion of the Cassillis

case which took place before this Committee in the 18th Century, Lord Mansfield took the view that it being agreed that no honour is passed by the 1642 Charter, beeause, as I have already said, that Charter was not superscribed, he took the view that all that was being said in the 1671 Charter was a repetition of the words of the 1642 Charter, whieh, it having been agreed that as they did not eonfer any dignity (the Docquet to the 1671 Charter said nothing about dignities), did not convey any peerage dignities either. He was left with this—and I am reading from his words—that he indieated that "as there is no appearance of words to convey the dignity, it is impossible to say that it passed by this eharter".

Chairman.] He is talking about the 1671 one?

Mr *Murray.*] He is talking about the 1671 one. He is proeeeding upon the basis that it was agreed that the Charter of 1642 no longer surpassed; the reason for that, as I understand it, being that the King had not been a party to the subseription of *that* deed.

Chairman.] No sign manual. So even although this Charter of 1671 said "*cum titulo dignitate*" and so forth, it did not actually earry any "*titulo*" attaehed, is that right?

Mr *Murray.*] He says that simply, if I may reiterate, in two ways. It is the same as the Oxfuird ease, my Lord. He said that first, by the Docquets which are joined to the Signature which makes no mention of the dignity; and second, the dispositive elause whieh grants the earldom and lordship exactly as in 1642, there are no words to the title of honour.

Lord *Scarman.*] So this is an example of the context destroying the dispositive effect of the "*cum*" elause, is that right, Mr Murray?

Mr *Murray.*] My Lord, it is a question, in that ease, of whether the "*cum*" elause is deseriptive of something, rather than a part of the dispositive clause.

Lord *Templeman.*] Whether it is descriptive of something that has happened, or whether it is dispositive of something new, that is what we have got to deeide.

566. Lord *Campbell of Alloway.*] If we had to look into the mind of the monarch—which I suppose we do really—surely the noble learned Lord, Lord Scarman *must* be right that you must have regard to the context? There is no other way that we can look into the mind of the monarch, if that is the right thing to do (as I hold it is in the present ease). That must be right, must it not? *A.* There is, of course, a difference that in Cassillis 1671 the title governed by the "*cum*" falls within the subjects resigned.

Lord *Campbell of Alloway.*] Yes, I see.

Lord *Scarman.*] I think we had better get baek to Loehmaben, Moffat and the Earldom of Annandale.

Chairman]. I think we shall have to leave this matter to be argued by Mr Murray, if he thinks it is neeessary. Howcver, I do think one is left feeling uncnlightened by the examination of this Cassillis title situation.

Mr *Murray.*] Perhaps it is fair to say that in the ease in which the matter is dealt with, Lord Mansfield referred to his decision with great diffidenee and said that he "had much lumber", as it were, to get through, to arrive at the position that he did.

567. Can we turn baek, perhaps thankfully, to the Annandale period, Prof. Donaldson? Can you help me in two matters here? First of all, the transactions of 1657. *A.* This is in my rcport, page 94?

568. Yes. That again is in the spare bundle of papers, is it not? *A.* Yes.

Mr *Murray.*] It is at page 268, my Lords. It is towards thc end of that loose bundle.

Lord *Scarman.*] Is this the Cromwellian resignation we are dealing with?

Mr *Murray.*] This is the Charter of Resignation.

569. I ealled it a Charter, but it is a Deed of Resignation, is it not, Prof. Donaldson? *A.* A Deed, yes.

Mr *Murray.*] What I wanted to ask you in eonnection with *that* (we have

already looked at its terms), is this. It bore a minute, at the end, page 274, which indicates that——

Lord *Campbell of Alloway*.] I am so sorry, my noble friend and I cannot follow, because we have lost the top of our pages and we just do not know where we are. Can you help us (because I am sure you would wish us to follow)?

Chairman.] You have got the bundle which starts off with the Act of Ratification, have you?

Mr *Murray*.] It is the very last document in that bundle, my Lord.

Chairman.] I do not make it the last one; it is about the middle of my bundle. We have got a bigger bundle than you, Mr Murray. It is numbered page 63 in the top right-hand corner of my copy, if that is of any use.

Lord *Campbell of Alloway*.] Thank you very much, I am very much obliged, my Lord Chairman. I do apologise.

570. Mr *Murray*.] What I wanted to ask you in this connection, Prof. Donaldson, was simply this. At the end of that document there is a reference to a resignation into the hands of Judge Mosley, President of the Exchequer, is there not. *A*. Yes.

571. Was the Exchequer operating through the Cromwellian period? *A*. There was a Cromwellian Court of Exchequer, I suppose one would say, just as there was a Cromwellian equivalent of the Court of Session, and the Cromwellian Administration set up its own new courts in Scotland, taking the place of the existing Scottish courts. So there would be a Cromwellian Court of Exchequer, and presumably this resignation was made in that court.

572. Do we know what happened to the Exchequer books for that period? *A*. Apparently not. I do not know of them; I have not traced them. But the fact is, the whole history of the Cromwellian Administration has never been completely studied, and I do not think all the records have been put together in the logical way that they are in other periods. I do not think one can say more about that, except that it was ruled out of order, as I think you said before.

573. You deal next, at page 94, with the transactions of 1661 and 1662. The principal copies of these documents have already been referred to, but you have typed on a separate sheet—and I think their Lordships were given it this morning—the draft Docquet and draft Signature to which I wish to refer. That should be an entirely separate piece of paper which was handed over this morning. The first part, which you have had typed out in full, Prof. Donaldson, is the draft Docquet, is it not? *A*. Yes. If I may say so, it might have been better if we had had the draft Signature first.

574. But anyway, that is the way that it has been done. If you have the photocopy before you, it has been photocopied in the same way, so that the draft Docquet appears first. This is on page 5 of the bundle of papers headed "The Proofs", the thick one, is it not? *A*. Yes.

575. Looking quickly at this draft Docquet, this is the document which Mr Bogie found in the Raehills archives? *A*. Yes, I believe so.

576. I think that you have transcribed the whole terms of the draft Docquet? *A*. Yes, it is complete, but with modernised spelling, may I say.

577. I think the point to which I wish to draw your attention is this: that about three-quarters of the way down the first page it refers to a "union and erection of the lands, lordships, baronies &c in an whole & free baronies, Lordships & Earldoms &c to be called the Earldom of Annandale and Hartfell and Lordship of Johnstone". Then it goes on immediately following with a disposition for "taking of seising of the said whole lands at the tower and fortalice of Johnstone"? *A*. Yes.

578. I think one can immediately contrast that with the wording of the Docquet to the Signature which actually passed, which is at page 111. I think that there we see that after the words "earldom of Annandale and Hartfell and lordship of Johnstone" the words relative to the style, title and dignity are inserted, which do not occur in the draft Docquet that we have just been looking at? *A*. Correct.

Lord *Campbell of Alloway*.] The point of single seisine is in the draft Docquet. It does not appear in the final one.

Chairman.] It is really quite different in many ways, is it not?

Mr *Murray*.] Indeed.

Chairman.] One cannot say that it is a draft that has been revised; it has been rewritten.

Mr *Murray*.] Indeed, my Lord, that is part of the point.

579. Can we just go on, Prof. Donaldson? Can we go on to the draft Signature, because I think you have taken out of the draft Signature the parts which might appear to be relevant for present purposes. Do we see first of all the draft Signature is "To our Sovereign Lord with advice and consent of Sir William Bannatyne"? *A*. Yes.

580. We know, from the Signature itself which we have looked at, that at the date of the Signature he had become Lord Bellenden? *A*. Indeed.

581. So can we date the period when this draft relates to? *A*. Before the 10th June 1661, when Bellenden became a Peer.

582. The draft Signature goes on to relate to the giving to his Majesty's "right trustee cousin James Earl of Annandale and Hartfell Viscount of Annandale Lord Johnstone of Lockwood", etcetera, "and his heirs lawfully procreated or to be procreated of his body". Until the 13th February 1661 James did not hold those titles, is that correct? *A*. That is correct, yes.

583. So is it reasonable to assume that these drafts must have been prepared between February and June of 1661? *A*. I agree.

584. At the bottom, or towards the bottom, of that page, do you again produce the words which relate to the incorporation of all the lands into a free barony, lordship and earldom to be called the barony, Lordship and Earldom of Annandale and Hartfell", and then there is no reference there to any title or dignity? *A*. No.

585. It simply goes straight on to order the tower and for talice of Johnstone to be the principal messuage of the said barony? *A*. Yes.

586. Having looked through the document, is there any reference in those drafts, prepared in 1661, to any title or dignity? *A*. No such reference appears.

Lord *Brightman*.] I am so sorry, but I am not quite sure what conclusion we are to draft from this.

Mr *Murray*.] The conclusion which I shall be inviting you to draw from this is that there was a change of circumstance between the period ending in June 1661, when a draft was, I think we can reasonably say, prepared, which related to the lands alone, and the draft which must have been prepared which forms the basis of the Deeds which were granted in April of 1662, because there is simply no reference at all to titles, styles and dignities, nor any reference——

Lord *Scarman*.] There is not reference in either to the peerage dignitaries.

Mr *Murray*.] Nor as to precedence.

Lord *Brightman*.] In other words, you are going to say that it must have been put in for a purpose?

Mr *Murray*.] Indeed.

Lord *Campbell of Alloway*.] How long does one allow for the preparation of documents? You say April 1662. I suppose the documents would have had to go back to London in early January, or as early as January 1662. The period must have been changed. You cannot take it, can you, fairly, right to the grant in April, because it takes time to get these things done?

587. Mr *Murray*.] I think we have heard evidence suggesting yesterday—this was by Mr Peskett—that it would take about a month to get such documents through? *A*. I would have thought so. You have got to allow a certain amount of time in transit, and a considerable amount of time to write these very long documents and for checking them.

588. Lord *Campbell of Alloway*.] What is a fair period that we have to

rely on? It was granted in April. How long would it take, approximately—two or three months—to transit? *A.* I should not have thought that. The actual transit would be a week, I should say, or perhaps 10 days, with good weather.

589. Then drafting, checking—a few days. I would have thought that a month or a little more would be a reasonable time to allow. *A.* Yes.

590. Mr *Murray.*] While you have not reproduced here, in the draft Signature, the recitals of all the lands and so on which you refer to, are they in fact contained in the draft long document? *A.* Indeed, the thing I have in my hand *here* (*indicating*).

591. You have the photocopy of the original? *A.* Yes.

592. Therefore, that material had already been in draft, as it were, from 1661? *A.* That is a presumption, certainly, yes.

593. Because as far as the recital of lands is concerned, that is the same material as is reproduced in the 1662 Signature? *A.* Yes. If I may interject, while one could envisage a draft Signature being prepared by an agent in Scotland and never going to London at all, this clearly *had* been to London. It would not have had the terminology it has at the beginning, if it had not had some finishing touches put to it in London. I do not think the Docquet would have been done so carefully, if it had just been a sort of trial draft. So this all would add a little to the length of time it might all take, I think. It had been to London and back again; that is the point, I think.

594. Are you suggesting that the draft of the 1661 one had been to London and back again, and that that was followed by the actual Signature and Docquet which were sent out? *A.* Which finally took effect, yes, in 1662.

595. Thank you. You were asked some questions this morning about the situation where two titles existed. In Scots peerages of the 17th Century were there cases where there were more than one holder of a title bearing the same name? *A.* Bearing the same name?

596. Perhaps my question is not clear. Can I rephrase it? In the 17th Century were there cases in Scotland of two persons holding peerage dignities in the same rank, which peerage dignities were of the same word? *A.* The same territorial designation?

597. Indeed. *A.* In the 17th Century?

598. Can I perhaps remind you of the case of the Earl of Morton? *A.* The 16th Century, with respect; would it not be that? Yes, after the 4th Earl of Morton was executed in 1581, the title of Earl of Morton went to a Maxwell who, anyone would have said, had rather a poor cliam to it, actually. He did not hold it very long, because a man with a better claim came along and got it. Maxwell was then given another title instead. Was it this case?

Mr *Murray.*] I am sorry to lead on this, but was it not the case that the 2nd Earl of Morton was——

Lord *Scarman.*] If you cannot get the answer any other way, Mr Murray, that is all that is left to Counsel to do!

The *Witness.*] The 2nd Earl of Morton, you mean; the second of those that I spoke about?

599. Mr *Murray.*] Maxwell. The King changed the name of the title to Nithsdale. *A.* I presume that is what would happen, yes.

600. I was simply asking you whether you were aware whether there was a practice of the monarch to change names of titles? *A.* The best known example falling in the early 17th Century is Melrose being changed to Haddington, when one of Jamcs's able ministers was Thomas Hamilton who was createcl, after some other titles, Earl of Melorse, about 1615, I would say. For reasons of Hamilton's own choice, I think, he did not think it was very suitable to take his style from a name of a religious house. He also thought it was more dignified to take his title from a sherriffdom, and it was changed to Earl of Haddington, at his suggestion,

I would imagine, but at the King's doing. Is that your point?

601. Thank you. Lastly, I think, as far as the Earldoms of Mar are concerned, was there a creation by Mary Queen of Scots, of an Earldom of Mar, in the 16th Century? *A.* So it is usually believed, and so Sir William Fraser decided in the 19th Century that there were two Earldoms of Mar. I think that a question asked this morning seemed to oversimplify the issue. When John the 6th Lord Erskine was created Earl of Mar by Mary in 1565, he was not, so to speak, a complete outsider ; his family or his ancestors had had a claim to the earldom for a long time. As to the ancient Earldom of Mar, the main line died out or the senior line died out in James I's reign, about 1430. It would appear that the King at that time deliberately excluded the Erskines, who had the best claim. The Erskines remained excluded from the Earldom of Mar for nearly 150 years. I have always thought that the 1565 creation was an act of belated justice in favour of the rightful heir to the earldom. Of course, the reason for the conclusion that there were two earldoms was partly because of a different destination.

602. Because the result was that the same man in the same body held the Earldom of Mar, though with two destinations, one from the original creation and one from the creation of Queen Mary? *A.* That would be the case from 1565 until the Mar case in the second half of the last century, when separate earldoms came into existence.

603. *Chairman.*] This Committee decided in 1865 that Mary Queen of Scots had created an earldom in 1565, and they held that Mr Goodeve Erskine (I think that was his name) was not the Earl of Mar, somebody else was. But then did not that Mr Goodeve Erskine establish a claim to the original Earldom of Mar dating to the 11th or 12th Century? *A.* The Earl of Kellie got the 1565 one, and Goodeve claimed successfully the earlier one.

Chairman.] When did he do that?

Mr *Murray.*] My Lord, perhaps I can interject, because there is a Statute called The Earldom of Mar Restitution Act 1885, which is in the papers.

Chairman.] Then we shall leave that.

Mr *Murray.*] Thank you. Thank you, Professor.

Cross-examined by THE LORD ADVOCATE

604. The *Lord Advocate.*] Professor, I wonder if you could assist me in one or two matters. You made reference just now to the draft Warrant which was produced by Mr Bogie to you. Could I ask you this? As far as that draft Warrant is concerned, and its description of the lands contained in it, is that description the same as the description of the lands which we find in the Signature which we have looked at so far as this claim is concerned? *A.* The Signature for 1662?

605. Yes. *A.* I have not compared them word for word, but I would certainly say they are very similar, they are substantially the same lands. That would be my point.

606. I think that in the 1662 Signature—if I can call it such—there is a reference to a resignation by the then 2nd Earl? A. *Yes.*

607. Is there such a reference in the draft Warrant? *A.* We have an abridgement of it here. I had better see it. This is where we have the text, is it?

608. *Chairman.*] There is a reference to the resignation on the second page of your excerpt. *A.* Of course. I was looking further down. It is the fourth line of the second page: " which all and sundry lands were resigned in the hands of his Majesty in favour of . . . to the said James Earl of Annandale ". There was a resignation.

609. The *Lord Advocate.*] As I understand your evidence which you spoke to, and as appears on page 94 of the second volume, you found a Minute of Resignation in Exchequer registered under the date 15th July 1661, is that correct? *A.* That is so, yes.

610. Do I understand *you* to conclude that that is the resignation referred to in the Signature of 1662? *A.* It seems very early for a conveyance which was not going to be given effect to until the following February.

611. I was wondering about that. You see, I think you agreed with my Lord Templeman that in the Signature itself there appear to be alterations from 1661 to 1662 and from the 13th to the 14th year of the reign of the monarch? *A.* Yes.

612. I am just wondering, does this suggest—and I just ask for your opinion —that prior to July 1661 there had been an intention in the then Earl of Annandale and Hartfell to enter into *some* engagement with the Crown, involving resignation of the lands and their incorporation into a terrirtorial earldom? *A.* Engagement with the Crown?

613. Yes. *A.* Yes, I would have thought so. That is quite possible.

614. Tell me this. As far as your researches are concerned, is there any case which you have been able to find in which an engagement having been entered into with the Crown, for the creation of both a territorial earldom and at the same time a peerage earldom, the reference to the resignation of each does not appear in the subsequent Charter of *novodamus*? *A.* I would have thought that an engagement with the Crown presupposes a resignation. To that extent the Crown was always a party, as it were, to something of this kind, because a resignation was made to the Crown. I think this is a less tangible thing, but it has some relevance to the Annandale case. I think we have to remember that in 1661 the King had just come back from his exile. He was, I have no doubt, besieged by people who wanted things in return for the services they had rendered him in the past. The King, on his side, may have been quite willing to *grant* things in return for services given in the past. So it was a period, I should say, when there was an unusual amount of this kind of thing.

615. I appreciate that. That was not quite the point I was making. *A.* I am sorry.

616. I beg your pardon. What I am simply saying is that in the event of a new grant being made which involved first of all, as far as lands are concerned, a resignation of lands to create a territorial earldom, and secondly the resignation of a peerage dignity in order to recreate that peerage dignity, within the same Charter, would you expect the Charter to make reference to both instruments of resignation (that is, resignation of the lands and resignation of the peerage dignity)? *A.* Two separate resignations?

617. Yes. *A.* I do not recall two distinct resignations being made. Sorry, have I misunderstood you again?

618. Yes. I am postulating that there *were* two instruments of resignation, one of the lands to the King, and one of the peerage dignity. In the event that that *was* the case, would you expect the subsequent Charter to make reference to each of those instruments? *A.* To judge from some of the cases which we have had before us, there might have been two separate grants. The title could have been resigned and regranted by one by Letters Patent; the lands could have been resigned and regranted by a Charter.

619. You see, as far as I understand the claim *here,* Professor, it is to the effect that the 1662 Charter creates first of all a territorial earldom, and secondly creates a peerage dignity, there having been, in 1661, a Patent creating the Earldom of Annandale and Hartfell. What I simply wanted to ask you was that if it be that between the grant of the Patent, the creation by Patent in 1661 of the Earldom of Annandale and Hartfell, there had in fact been a resignation of that earldom as a peerage dignity, to the Crown, for the purpose of a regrant in the Charter of 1662, and also there had been a resignation of the lands which were to be created into a territorial earldom, to the Crown, by a separate instrument; would you expect the Charter to include reference to either or both those instruments of resignation, in the "*Quequidem*" clause? *A.* I think one *would* expect it, but I do not want to go off at a tangent. However, could I put another possibility to you? We have the 1661 grant of the Letters Patent of the dignity. May it have been

intended to follow that up with a resignation of the lands and a regrant of the lands, which happened in some other cases by separate documents, and before the procedure about the lands was carried out, circumstances had changed, and what emerges at the end is the 1662 Charter with the lands and the title tacked on?

620. I think again I am simply postulating that there *was* an instrument of resignation of the Earldom of Annandale and Hartfell between 1661 and 1662. If that *were* the case, would you expect, from your knowledge of contemporary documents and from those which you have produced to the Committee, to see some reference to such an instrument of resignation in the Charter, or not? *A.* I do no recall a charter which proceeds on two separate resignations.

621. You see, the only reason I raised this is that I know that Airth is a case in which the monarch decided not to proceed, but I think that in that case am I right in saying that the Signature and the Docquet which was presented to him, although not accepted by him, proceeded upon a recitation that there *had* been a resignation of the peerage dignity? *A.* Yes.

622. I would just like again to ask you to look at the second volume of the case, at page 58. *A.* This is William Hunter's account, is it?

623. That is right, William Hunter's account. You will see, at line 449 and following, there is a reference to "resaigneing the Earledome of Annandaill & Hartfiell" and so on "ane instrument of resignatione therupon, long buiking and extracting therof and parchment therto." Do you see that? *A.* Yes.

624. At line 456 there is: "instrument of resignatione of your haill lands buiking and extracting therof and parchment therto." Do you see that? *A.* Yes.

625. That would suggest two separate instruments. Would that appear to be the case? *A.* You see, the trouble is, we have no dates on any of these things.

626. I appreciate that entirely, Professor. I think this a problem which their Lordships may have to deal with. However, I am simply for the moment just asking you to look at these particular items. These would appear to be two separate instruments? *A.* It looks as if there were two separate transactions.

627. Would I be right in saying—just bear with me—that in each case "buiking and extracting . . . and parchment" suggests a completed transaction, including registration of that particular instrument? *A.* Yes, it does look like two complete transactions.

628. So far as the instrument of resignation is concerned, if it be the one which you found in the Register, that Register still is extant in which such an instrument of resignation would be found? *A.* Yes.

629. Could I ask you this? If there *were* an instrument of resignation resigning the Earldom of Annandale and Hartfell, as is itemised at line 449 and following, which was resigned in the hands of the Lords of Exchequer—and one would say that that was some time after 1661, that is, after the creation of the earldom—into what Register would that have been booked? *A.* There is only one Register of Resignation, as far as I am aware.

630. What Register would that be? *A.* That is the one to which I refer on a page of my own report.

631. *Chairman.*] Page 94? *A.* Page 94 of my report.

632. The *Lord Advocate.*] What I want to be clear about is that we have had a suggestion, in evidence before this Committee, that there was a Register of the Exchequer which would cover the period with which we are particularly concerned (that is to say, between 1661 and 1664), which was destroyed by fire in 1811. Is that within your knowledge? *A.* It is odd to reconcile that with the existence of this Register of Resignations extending from 1661 to 1682.

633. *Chairman.*] That contains only minutes—that is to say, a mention of the resignation—without having the whole Deeds, is that right? *A.* That is a possibility, thank you, my Lord.

634. You have had a look at this Register yourself, have you not? *A.* That is true. The volume which was destroyed, covering a shorter period, I observed might have had fuller entries. The volume containing minutes would naturally cover a longer period.

635. What exactly is in this Register which you say has minutes in it? What are they like? *A.* Minutes of resignations are brief entries summarising what is in it. This entry is correctly reproduced in the old printed Annandale Evidence which we might perhaps look at.

636. If there had been, during that period, a resignation of the peerage dignity, would you expect to find a note of that in this Register which contains minutes? *A.* Perhaps we may have this produced—page 606, part 2.

637. Lord *Campbell of Alloway.*] What is the Register called, and where is it kept? *A.* In the Scottish Record Office, General Register House, Edinburgh.

638. What is it called? *A.* This is called "Minutes of Resignation in Exchequer"—no, sorry, "Register of Resignations by Vassals" (that is, Vassals of the Crown).

639. By Vassals? *A.* By Vassals, yes, 1661 to 1682. They are very brief entries in *this* one (*indicating*). May I read it?

640. The *Lord Advocate.*] Yes, please do. *A.* 15 July 1661: "Mr John Henrysone macer" procurator "for James earle of Annandaill resigned the barony of Johnston Moffetdaill Evendaill Hutton Corrie & Newbie the teynds personage & vicarage & patronages of the kirks of Johnstone Hutton Corrie &" others "in the" procuratory "in favuors of himself his airs and assignayis." That is 15 July 1661. That does not seem to relate very closely to the items we have been dealing with. However, a minute, simply because of its brevity, may misrepresent the substance of the whole transaction.

641. Lord *Campbell of Alloway.*] Is there any reference to the resignation of the title? *A.* It does not mention it. It does not even seem to cover all the lands. It is very heavily abridged. But, as I say, this is a minute book, and a minute book is merely a guidance to the complete Register. If the complete Register had survived, we might have had some of our questions answered.

642. Lord *Templeman.*] Have we got a copy of the minute? If not, perhaps we might be provided with it? *A.* A copy of *this* (*indicating*)?

643. A copy of the minute which is relevant and records a resignation? *A.* Shall I read it again?

Lord *Templeman.*] I am simply asking for a copy of it.

The *Lord Advocate.*] I will make arrangements that this be copied, my Lord.

644. One question further, Professor. I think you said that the Procurator mentioned there is Mr John Henrysone who I think is not the name of either of the Procurators mentioned in the Charter of 1662, is that right? *A.* Yes, I would be inclinded to believe that anyone making a minute might simply jot down certain of the proper names of places which caught his eye, and he would not attempt to represent the full substance of the transaction. That is why it is difficult to attach a great deal of authority to a minute.

645. Can I be quite clear about your position, as far as the present claim is concerned? Do I understand your evidence to be this: that from your scrutiny of contemporary Deeds, you have found no occasion, as I understand it, upon which there has been a grant of an earldom of the same name to the same person as is being suggested in this case, by virtue of the Patent of 1661 and the Charter of 1662? *A.* Within such a short period?

646. Yes. *A.* That, I think, is true.

647. Secondly, do I understand you to say that if there had been a resignation of the peerage dignity created by the Patent of 1661, from your general knowledge of the drafting of such contemporary Deeds, you might have expected

some reference to such a resignation in the Charter which regranted the peerage? *A*. As I think I said before, I have no very clear recollection of references to proceedings on resignations of peerages, of titles. After all, we have not yet found evidence of the resignation of a title.

648. That is what I wanted to be quite clear about. Again, so far as *your* researchers go, you have found no evidence, within the Registers, of a resignation of the peerage dignity of the Earldom of Annandale and Hartfell, prior to the Charter of 1662? *A*. That, I think, is true.

649. I think it would appear, however, that there is that one item which I referred you to in William Hunter's accounts, which makes some reference to this; and would it be fair to say that its description suggests something which if it be correct, would indicate registration (that is to say, the words "buiking and extracting thereof and parchment therto")? *A*. That would indicate a resignation of the——That is the thing on page 58?

650. That is right. *A*. Yes, that would indicate a resignation of the earldom. But clearly that has not survived in that Register of Resignations, unless it is extremely badly described in the notes.

651. Lord *Brightman*.] I am sorry, I could not quite hear your last answer. *A*. I said that there is no reference to that in that Register of Registrations—or, rather, Minutes of Resignations—unless it is extremely badly described in them.

652. I was wondering whether "long buiking" really meant "booking in full" as opposed to a mere minute. Is that a possibility, or not? *A*. Of course, the "long buiking", the full version, would occur conceivably in that volume which has vanished, you see, and all we are left with is this very brief minute.

Lord *Brightman*.] Exactly, yes.

653. *Chairman*.] But you confirm that there was some record containing these registrations in full, which has been destroyed *A*. That would appear to be so, yes.

654. Lord *Brightman*.] I am not sure whether you assented or not to my suggestion that "long buiking' might mean "booking in full" (in other words, "reproducing in full")? *A*. I am sorry, my Lord, yes, I would accept that. I think that that is a very sound suggestion. "Long buiking" meant "booking in full", as opposed to booking a minute, yes. But that has not survived.

The *Lord Advocate*.] I have no further questions.

Chairman.] I think we had better adjourn at this point. How much longer do you think the proceedings will last, Mr Murray? We are not, I think, able to sit on Thursday, that is definite, because one of our numbers has got a longstanding engagement for that day.

Mr *Murray*.] My Lord, I was intending to lead one other witness who might take some time, again depending on the reactions of your Lordships to some of his evidence. I would have thought that the evidence would be liable to take until lunchtime tomorrow. Making the best estimate I can (and then it is rather difficult to know how many topics I require to cover, or how fully I require to cover certain particular topics), I think that my submission would have to be a fairly detailed one in certain respects at any rate.

Lord *Scarman*.] You have got a lot to argue about, Mr Murray, have you not?

Mr *Murray*.] I think so, my Lord.

Lord *Brightman*.] And authorities as well?

Mr *Murray*.] And authorities. There are obviously certain documents to which I have not directed certain witnesses' attention, to which I would wish to direct the Committee's attention.

Lord *Scarman*.] I have the judicial business of the House in mind, in putting this question. If we *were* to sit on Thursday, you know the compass of your submissions, you know the compass of your evidence; would there be

a reasonable chance of finishing the hearing this week, or do you think it would be longer?

Mr *Murray.*] My Lord, I think the answer to that is that I would very much hope so, but it does depend on the assumption that I would be able to start tomorrow afternoon.

Lord *Scarman.*] I agree. Just looking at it from the compass of your submission, you think that given a reasonably free wind, you should make port by Thursday night? You see, we are in trouble, since there is a very important judicial case due on Monday, and some of us are in trouble on Thursday. I was just seeing where we were, if you were to go continously. We would have tomorrow and Thursday. Would there be a reasonable chance of finishing on Thursday night, if that were possible?

Mr *Murray.*] If that were possible, I think that it *would,* from my point of view, my Lord. I have to make the qualification that I am making the assumption that the evidence will be concluded by lunchtime tomorrow.

Lord *Scarman.*] So you think you could finish in two days, if we were to have the Court postponed?

Mr *Murray.*] My Lord, it may be most important that you do not be misled. That is my problem.

Chairman.] There is a chance of it. It would be possible for us to sit with a reduced number on Thursday, if that were necessary to finish the thing, but we shall just have to see what progress we make tomorrow.

Mr *Murray.*] I am obliged, my Lord.

The witness withdrew

Adjourned until tomorrow at 10.30 *am*

Wednesday the 19th of June 1985

Lords present:

Aberdare, L.	Campbell of Alloway, L.
Beswick, L.	Keith of Kinkel, L.
Brightman, L.	Scarman, L.
Caccia, L.	Templeman, L.

The Lord Keith of Kinkel in the Chair

Counsel and Parties were ordered to be called in

Mr *Murray*.] May it please your Lordships, I have some questions to put to Professor Donaldson arising out of the Lord Advocate's questions.

PROFESSOR G. DONALDSON, recalled

Examined by MR MURRAY

655. Professor Donaldson, would you turn, please to page 58 of the second bundle, which is the account book of William Hunter? *A*. Yes, I have got that.

656. Your attention was drawn to the item beginning at line 449, to the "resaigneing the Earldome of Annandaill and Hartfiell in the hands of the Lords of Exchequer and fore wryteing ane instrument of resignatione thereupon long builking and extracting thereof and parchment thereto £20." You indicated to their Lordships that a minute relative to this matter had been looked at by you, and I think a copy has been made available to their Lordships. Do I understand the minute was an entry in the personal books of a Macer of the Exchequer Court? *A*. That would be my impression.

657. At the relevant time was the practive for each Macer to have a personal book? *A*. That appears to be so, and I would have thought there would be three or four Macers.

658. Throughout the relevant time there would be three or four Macers of whom one only book has been found? *A*. That has survived, yes.

659. And I understand on a different hypothesis, the question being we have seen the relevance, and it would be regarded in a different minute book that has not survived—— *A*. Correct.

660. Would you turn in the same bundle, please, to a particular item which I do not think you were referred to specifically, in fact I know you were not referred to it specifically before, which is at page 18. As you can see from page 20 it is a copy of the opinion of Sir John Anstruther in January of 1793, but the passage I want to refer to is on page 18, the third paragraph in the middle of the page, which says: "Next in the Case of Cassillis the Instrument of Resignation excluded the idea of the Title of Honour being resigned, for it bore to the fore establishing the fee of my Estate in favour of my Heirs after-mentioned—in the present Case it is true the Procuratory of Resignation is lost but it seems untenable to suppose that it contained what was granted by the Charter." The reference which is there made is to a lost "Procuratory of Resignation". In your experience, Professor Donaldson, are Procuratories of Resignation items which tend to be kept or not? *A*. I would have said they do not tend to be kept. I do not recall having seen a procuratory for making a resignation. It may be regarded as a somewhat ephemeral document, and once it has achieved its purpose there is no point in keeping it.

661. Lord *Scarman*.] Is that your research experience? *A*. It is only experience, but I think the same applies. For example, there was a letter of attorney in respect of a particular sasine, but such letter of attorney has very rarely been preserved.

652. But we know what has been preserved in this case: the Chamberlain's Accounts, the minute book of Mr Hunter, and so on. You may be right, but is it not rather speculation than experience? *A.* It is inference, my Lord, but there is a difference between a volume of accounts and a small piece of paper, and it would be a small scrap of paper. I think there is a difference, there is the actual likelihood with a volume of accounts.

663. The instrument of resignation, you say, would be a small piece of paper? *A.* With respect, not an instrument of resignation, but the procuratory empowering somebody to make a resignation. The instrument was important and the procuratory was relatively unimportant. He would turn up to make the resignation, produce a procuratory, the notary notes the procuratory has been produced, and he has to act in virtue, but once it has happened I do not think much importance attaches to the document.

664. You would not put it so high as a lost resignation? *A.* I should have thought there would be the stronger inference of loss of procuratory than resignation.

665. *Chairman.*] The fact is the instrument of resignation itself is important and it would be recorded in the book. It is suggested in these questions the instrument of resignation itself was destroyed by a fire in 1811, but the procuratory would not be of any significance if we had the instrument of resignation, would it? *A.* That is very much my point, my Lord.

666. Not only the procuratory of resignation is lost, but of course for Sir John Anstruther the fire had not taken place but he had not seen the resignation itself, had he? *A.* No, but the recorded resignation in the volume in which it had been long booked, as it was put, that volume was a public record, whereas the instrument of resignation was not a public record but privately archived, and if preserved at all it would be among the family papers.

667. But the fact remains the terms of resignation would be in the public book? *A.* Which has no doubt gone.

668. But Sir John Anstruther did not see a copy or anything even though there was an instrument or resignation which was recorded in that book which was in 1793 available? *A.* I forget the precise date of the fire.

669. 1811. *A.* We do not know whether he looked for it. It is not a record which is very often consulted.

670. He does talk about the procuratory of resignation instead of the instrument of resignation itself? *A.* It may suggest he was aware the procuratory had existed among the family papers. Would it be a possibility?

671. Lord *Scarman.*] Can you explain to me the meaning of the word "procuratory"? *A.* Simply a document where somebody promises his procurator to perform certain functions on his behalf—his proxy.

672. In neutral terms he appoints an agent to perform the task, in this case to submit the instrument of resignation? *A. Yes,* but the procurator could be appointed for many different purposes.

673. A clue to the meaning of it is the word "procurator"? *A.* Yes, indeed so.

674. *Chairman.*] Instead of the grantee of an instrument of resignation going along himself, he sends somebody else, no doubt a lawyer, having appointed him procurator, to hand in this instrument of resignation? *A.* Exactly so.

675. Lord *Brightman.*] Could you tell me on page 101 with the signature, is Colin Haig William Hunter correctly described as a procurator there? He is not so described so far as I know, but would he be in fact a procurator? *A.* At the foot of the page?

676. Yes. *A.* No, my Lord. Colin Haig and William Hunter are notaries public who record the resignation. They are not the procurators.

677. His function would be to record the resignation? *A.* The notary public's function was to draw up the instrument of resignation. The record the procurators had made, the resignation — the

procurator is not so far as I see making ——

678. According to the reference to the procurator's first name —— *A.* But not their names—by them and their procurators in their names. This was a very ordinary procedure not only for matters of this magnitude but relatively trivial matters as such where you went through the same procedure and appointed a procurator to make your representation.

679. Lord *Templeman.*] What about the chaps mentioned on page 101 ; what are their functions? *A.* On page 101?

680. Yes, what is their function? *A.* Whereabouts—in the middle?

Lord *Templeman.*] In the middle.

681. Mr *Murray.*] May I suggest to you, Professor Donaldson, in this deed, apart from the lands always in the family of Johnstone, there were added to those lands certain other lands acquired from gentlemen such as the Earl of Eglinton and Winton, and I think it is cited earlier in the deed, and it would appear to be a resignation in relation to the parcels of ground being added into the one unit? *A.* They were previous holders.

Lord *Brightman.*] So to get a new grant of land, at any rate, it was necessary not only for the resignation of the Earl but the resignation of those people who would have an interest in the land at that time.

682. Mr *Murray.*] Other people had apparently sold to him or this case is made after additional lands. In order that a good title of the whole lands be obtained on a new designation by an Earl, a new letter of resignation was necessary? *A.* If lands were held of the Crown and A wanted to dispose of them to B, the only way was to resign those lands in the hands of the Crown in title to B. So when you get an incorporation of vast numbers of properties into a scheme of an Earldom or whatever, as in this case, inevitably a number of people had been involved at an earlier stage before you get to that object.

683. Lord *Campbell of Alloway.*] Is this right: you could not get a single seisin without a series of resignations? *A.* You could not get a single sasine until the lands had been incorporated together, and before they were incorporated there had to be those various resignations.

684. *Chairman.*] If any land was sold or gifted by the proprietor to another and that land was held of the King, it was necessary for the grantor or seller to exercise a resignation in favour of his purchaser. That was the conveyancing procedure at the time. Is that right? *A.* That is so. The Register of the Great Seal consists largely of transactions of that kind, which are strictly grants of the Crown but confirming conveyances from one private party to another.

685. Lord *Scarman.*] And one hears an echo of that in the Charters's land, where there was a resignation of land being owned by, I think it was, Sir John Charters to the Earl or to a member, at any rate, of the Earl's family? *A.* Yes, and then it is incorporated with the rest.

686. On the procurators, now you have helpfully explained what it is about, could I take you quickly to the account of Mr William Hunter in the second bundle at page 58, which is for my information line 440: "Item pro [curat] orie of resignatione for resaigneing of the saids hail lands long £6·0·0." What does that mean? This William Hunter must have drawn up a procuratory of resignation for resigning the whole lands which must clearly have been of some substance—£6. £6 is not very much but for "item deputatione of the Stewartship of Annandaill to sh[eets] long £1·6·0." In 454 he only got £1·16·0.

Lord *Scarman.*] And £26·13·4 for "transumeing" and writing the same over again into Latin. So you did not get much for scholarship either.

Lord *Templeman.*] 436 is something which was going in connection with what was a resignation or something of 1657 in Cromwell's time, and 440 may have been connected with it or it may have been connected with the other one, which is the account written to William Hunter, who was the drawer of these things. This is an entry in his regis-

try. It does not get you anywhere near proving anything, if we are going to construe the document which is inadmissible and hearsay. The Lord Advocate does not come here in an advisory role. Nobody has turned up in opposition. It does not do them any good to knock out these claims, because they cannot prove their own. It is left to one or two others to say really this is quite inadmissible on the question of construction, and we cannot construe anything by what somebody's servant wrote about it later on.

Chairman.] Mr Murray, you say 449 and 452 do not go to the question of construction but whether there had been a resignation?

Mr *Murray.*] Indeed, my Lord.

687. Lord *Scarman.*] Similarly it is quite clear, I would have thought, that 436 and 438 are referring to the instrument of 1657. You cannot take it further, but you can take it that far, and item 400, to which I would draw your attention, you think it would be (I cannot say more than this) drawing up some instrument of declaration relating to the instrument of resignation for resigning the said lands, but let us see whether it refers to 1657 or 1661. *A.* I should have thought the balance of probability would be in favour of 1657.

Lord *Scarman.*] That is what I would have thought, and I do not think you can do more than make that comment, which we note, it was the intention to resign in 1657.

Mr *Murray.*] I just wanted to say that Mr Hunter was the lawyer running that item of procuratory.

Chairman.] We note this is most relevant to the 1567 resignation, which is explained, saying for resignation you would have to have a procuratory. 440 refers to that procuratory for resignation. As regard 443, we know it was a "signature", because we have had it before. Mr Hunter claimed for drawing it up. 449 is an item for another resignation, which we have not got. That seems to have disappeared, if it ever existed. One can see there is evidence indicating the resignation of the Earldom was drafted by Mr Hunter and took in the relevant position.

688. Lord *Templeman.*] I give notice I reserve my position entirely. Where did the resignation of 1657 come from, a resignation that did not make any difference? *A.* My Lord, on page 94, part of my own report, there is a statement about this, the resignation of 1657, which is well-documented, as you can see.

Chairman.] It was in the minutes of the 19th century proceedings before this Committee, but we have not got it amongst our papers, have we, Mr Murray? The 1657 resignation is not amongst the papers before us?

Mr *Murray.*] It is, my Lord, and it is in the loose bundle, and this is the one where I think your Lordships are separately paginated. Yesterday page 63 of your Lordships' bundle was——

Lord *Templeman.*] The 1657 resignation does not matter. This proceeds from the original in the papers and with a minute saying it had been resigned. Is that presumably a record of one on his file which is speculation and it is not thought of as a fact?

Lord *Scarman.*] No Scottish Peer in his senses would have resigned a title of honour to Cromwell.

Mr *Murray.*] Could I ask a question on inadmissibility at this stage?

Chairman.] I think at this stage it would be undesirable to go into that. No doubt Mr Murray has the point well in mind.

The Lord Advocate.] I think it might be right if at this stage I made one point to your Lordships' Committee. Because of the way the evidence has been taken, we have obviously been considering the matter of the possible resignation which, as I understand it, would be in respect of the Patent of 1661, the effect of which of course would be to make that Patent not longer effective, that is from the grant of the Charter of 1662. My Lords, it is right to say that so far as I read the Petition upon which I prepared the report, the Claimant specifically reserves his rights, and I refer to page 14 of the first volume, the very first article of the Petition. My Lords will find there article 34: "The Claimant re-

serves his right to establish his claim to the peerage dignities granted by the Patent of 1661 upon proof of the extinction of heirs male of the first Earl of Annandaill and Hartfiell."

My Lords, the matter is taken further in the case which has been lodged in support of the Petition, and my Lords find the Case Stated under six principal heads on page 34 and following. My Lords, may I say that first head is the one which is relevant, and between letters A and B my Lords will find the assertion that the Charter operated not only as a grant of the territorial Earldom but a new grant of title of Earl of Annandaill and Hartfiell and some series of heirs, and that matter is carried further.

If my Lords turn on to page 41 of the print, and, my Lords, this is in further argument in relation to head 1, five lines down on page 41 is the first submission the Claimant makes: "The claimant therefore submits that (standing the Resolution of the Committee for Privileges 1844) there are two peerage Earldoms of Annandaill which bear the same name."

Lord *Templeman.*] Are you going to put this to Mr Murray later on, the allegation of a resignation?

The Lord Advocate.] My Lord, that goes on to the second paragraph there: "There is no anomaly in there being two peerages of the same title and name, held by different persons. In the *Balfour of Burley and Kilwinning Peerage Claim 1868,* Lord Chelmsford went so far as to say that 'there can be no objection to two persons having the same title of nobility, of which many instances might be adduced.' It is not uncommon for a title to be granted with a destination to one series of heirs and for the same title to be granted again to the same recipient with a different destination to take account of the fact that he by that stage has no heirs under the first destination."

My Lords, the only reason for the introduction of this is because, as my Lords will understand, if the claims in relation to resignation were to be pursued further by my Lords' Committee, the effect of this would be effectively to destroy the effect of the patent of 1661. That is his interest in sustaining that patent as against the Charter; this matter was to be developed in evidence or challenged with evidence. My Lords, I have I think as fairly as I can asked certain questions of the witnesses, who have referred to the instance of resignation, but it appears to me, if my learned friend were to carry this matter further, it might be that the article of the patent should be further extended and the matter reserved in order to allow those who might claim an interest in sustaining the patent of 1661 against the argument that there was a resignation——

Lord *Scarman.*] Fairly shortly, what you are saying is, if they are going to have a submission either to challenge or alternatively that the first peerage is extinguished, then others are interested who might well wish to object who have not objected, and they must have an opportunity to come into the proceedings.

Lord *Templeman.*] I do not think it matters. It is quite clear the title of honour you cannot resign. You may resign land because you may tenant the item. Mr Payne got his procedure wrong and thought all he had to do was with the deed of resignation. I find quite incredible that what we are looking for is an alteration by the Monarch and what the Monarch did in 1661 is, you have to say, the Monarch erased and started over again.

Chairman.] I think it may be helpful if we got on with the evidence and finished and then had some argument, in which case Mr Murray might receive some fast bowling, but this mix-up of evidence and argument I think is not of great assistance.

Lord *Templeman.*] I am sorry, I think it is my fault. Having spent a good many years looking at evidence and hearsay I was driven into argument.

Mr *Murray.*] My Lords, I think I have no further questions to put to Professor Donaldson.

Chairman.] Thank you, Professor Donaldson, that is all.

The witness withdrew

Mr *Murray.*] I would now propose to invite the Committee to listen to the evidence of my last witness, Professor Halliday, who will deal with certain conveyancing aspects of the Charter of 1662.

PROFESSOR JOHN M. HALLIDAY, called

Examined by MR MURRAY

689. *Chairman.*] You have been duly sworn, Professor Halliday? *A.* My Lord, yes.

690. Mr *Murray.*] Professor Halliday, I think you are the Emeritus Professor of Conveyancing in the University of Glasgow and you are still a special adviser to the Government on conveyancing and feudal reform in Scotland, and in the course of your career you have had a long period as Professor of Conveyancing at Glasgow and Chairman of the Committee of Conveyancing Law and Practice and a part-time member of the Scottish Law Commission, amongst other things? *A.* That is correct.

691. In this instance I think you were asked to look particularly at the Charter of 1662 from the point of view of the conveyancing aspects? *A.* That is so.

692. And you prepared a statement which is part of the second bundle on conveyancing at page 78. Could I ask you this, Professor: in order to comment on this matter did you examine a number of documents which are contained in the illustrative charters and others which have been mentioned in this case? *A.* Yes, I examined the Signature itself in the Scottish Records Office and the records of the Charter in the Register of the Great Seal and also examined the records in the Register of the Great Seal of various charters which I referred to in my statement.

693. The first point you deal with in your statement is the question of the procedure which led up to the grant of 1661. We have already had a description from Professor Donaldson of the nature of procedure required to be passed through in order that a good charter be created. From the point of view of the procedure have you examined what was done? *A.* Yes, I have. It appears to me that the procedure was completely regular. The signature was under the Royal Sign Manual, as it had to be for a dignity. The docquet which accompanied the Signature referred to the new destination and title and to the grant of the dignity. So all those things were properly done prior to the *novodamus* of the Charter; in other words, the procedure appears in all respects to have been regular.

Lord *Templeman.*] I do not think anybody has suggested the Charter was not completely effective in relation to lands described in there.

694. Mr *Murray.*] Professor, the question which is perhaps in issue here is whether the structure in the Charter and, in particular, the position of the words which are relied on by the Claimant in the present case were in the appropriate place for the creation of a dignity? *A.* Yes, they were. They naturally followed erection into barony and earldom with the benefit of a single sasine, and at that point there was the insertion. That was normal for charters at the time. There was inserted what appears to me to be the granting of a dignity, the point being it was followed by a certain sasine, and if you put in a grant of a dignity at that point the one sasine did for the whole. There are several charters I have examined where it is exactly in the position where the grant of a dignity appeared.

695. In other words, Professor, the context of the erection of the territorial earldom was there followed by a dignity and followed by the provision in relation to the grant of seisin? *A.* That is correct.

696. I do not know if it is necessary to take you to the detail of this, but if you look briefly at the illustrative charter, which is page No. 3, immediately following this part of the document, that is the Lordship of Kinloss, do we see on the right-hand side there, about two-thirds of the way down after the recital of the lands set out that the King has erected in free temporal lordship, barony and regality of Kinloss, and it refers to the said title of honour, which is capitals in this print, as Lord of Kinloss with parliamentary vote and so on, and it is followed by the words "*et ordinando*", the said abbey as the principal place, and is

that a record of the place where the seisin will be taken? *A.* That is one example.

Mr *Murray.*] And if one looks——

697. *Chairman.*] Before you leave this, had there been any barony of Kinloss before this title and dignity? *A.* I cannot tell that, my Lord, I am sorry.

698. Are you saying this is the first title of Lord Kinloss? *A.* It would appear to be so, my Lord. I cannot speak to it with accuracy without looking at the history.

Mr *Murray.*] Is it not the case that this is an instance in which lands which had been monastery lands were being resigned by an abbot, and if we look at the next, which is the Lordship of Balmerinoch, which is the same position or very similar in this incorporation of the specific lands in the left column into the Lordship and Barony of Balmerinoch, and the grant talks of barony into title of Barony of Balmerinoch.

699. *Chairman.*] In these two we have the words "*concedendo*" and the accusative "*titulum et honorem*", which would indicate the King did say: I grant and *concede* this "*titulum et honorem*"? *A.* That is correct, my Lord. In the actual record of the Charter itself, which I have seen, "*concedendo*" is used, which appears to have been the granting of the dignity in a different form from the present Charter.

700. Mr *Murray.*] Is there any case where the resignation of a dignity is not granted in the case of a dignity, which is the usual practice according to the evidence? *A.* I am sorry, my Lord, I do not quite get the point.

701. *Chairman.*] I think the question being asked is, are you aware of any instance where there has been a grant of dignity previously created without the dignity being resigned and the resignation cited in the new grant. *A.* Offhand, my Lord, no, I cannot remember that.

702. Mr *Murray.*] I think we can see from the Lordship of Balmerinoch from the recital at the top of the left-hand column it is James Elphinstoun of Barntoun, described as a soldier or a knight, I think, being the correct translation of "*militem*". So it was clear there was no dignity at least in the individual at the stage where the grant was made? *A.* It would so appear.

703. I think the same pattern can be seen relating to the Lordship of Holyroodhouse in a slightly different position at the bottom of the top of the left-hand column again for the incorporation of barony into Holyroodhouse, and "*concedendo*" the title specified. *A.* That is correct.

704. *Chairman.*] Is it in the ablative? *A.* It is the ablative absolute.

705. They are being granted in other words? *A.* Yes.

706. Lord *Brightman.*] "Granted", is it right? "Granted the dignity, title and honour, etc."? *A.* Yes, that is correct.

707. Lord *Scarman.*] That is good Latin, is it not? You can use an accusative verb or ablative absolute. *A.* You could do it in that way, my Lord, yes.

708. Mr *Murray.*] I think at this point I was concerned with the position in which the words are relative to having the seisin, and the point I make relative to these charters is that as far as the present case is concerned where we have a situation of the creation of the territorial earldom, then the words "*cum titulo stylo et dignitate*" followed by the words single seisin in the order of this, follow the pattern you have ascertained from your study of other charters? *A.* Yes.

Lord *Templeman.*] In the Holyroodhouse Charter the description of territorial grant follows the grant of the barony. The left-hand page is concerned entirely with the barony. So it is not the same. In the earlier one you get the grant of the barony on the left-hand page and the territorial extent is on the right-hand side.

709. Lord *Scarman.*] I think in Holyroodhouse and Balmerinoch they are the other way round. In Kinloss you get

the grant of the honour two-thirds of the way down: "... *concedendo dictis Ed. &c. titulum et honorem liberi baronis et domini parliamenti* ...," the parliamentary lordship? *A.* That is the position.

710. What interests me is another point really. It is declared that it is a peerage dignity because of the use of *dominus parlimenti* or I think the genitive "*domini parliamenti*"? A. He is a parliamentary Lord.

Lord *Scarman.*] And similarly in Balmerinoch you find a reference to a parlimentary lord.

Lord *Templeman.*] And accordingly he promises to ratify at the next parliament.

711. Lord *Brightman.*] Are you saying the grant of the territorial title comes before the grant of the dignity? I thought the territorial titles comes first? *A.* It is the grant of the land and with that they come to the *novodamus* that makes them into a single barony or lordship, and then you get the dignity, so a single seisin does for all.

712. Lord *Scarman.*] And the difference in style is then in Kinloss and Balmerinoch "*concedendo dicto . . . titulum et honorem liberi baronis et domini parliamenti*", and in our present Charter is "*cum titulo stylo*", etc. *A.* That is the significance.

Mr *Murray.*] So far as the wording in our present Charter is concerned, if we look for a moment at the significant words of the Charter and *novodamus,* which is in a separate bundle, if one looks at page 255 in the Latin text.

Lord *Scarman.*] This is the Annandale Charter, is it?

713. Mr *Murray.*] It is the Annandale Charter. I think on page 255 we see the *novodamus* clause begins near the top of the page with the words, conveniently after the italicized words, with the words "*Et praeterea*"? *A.* Yes, that is where the *novodamus* clause begins.

714. And it cites for the regiving of certain lands a *novodamus* down to line 40 where a fresh italicized portion begins? *A.* This is giving the resignation of the lands which had already been resigned.

715. And then it goes on with the words "*Et similiter*", and I think what follows after the words "*Et similiter*" is the erection by the Monarch of lands which have been given afresh into an earldom? *A.* Yes, that is correct.

716. Then that is followed by the name of that earldom as naming "Annandaill *et* Hartfiell *et dominium de* Johnstone", and then the words "... *cum titulo stylo et dignitate comitis secundum datas diplomatum*", and so on? *A.* That is correct. If I may explain what was happening, it is that *et similiter* is indicating we are still in a *novodamus* situation, and likewise what has gone before is different in this respect, that this is the grant which is new, something not resigned. It is the erection of these lands into a barony and earldom with the benefit of single seisin. The barony before it did not include the land acquired from Sir John Chateris, and then you have the following. Therefore, a new royal grant is necessary and this is the *novodamus* clause going on to the second function, that is it can be an original grant.

717. Lord *Templeman.*] Of the land? *A.* No, this is granting the barony. This is erecting it all into a barony, and it is a new and original grant of barony.

718. Mr *Murray.*] Because the land is a separate thing from the barony, if I could put it in this way, a mere grant of land is one heritable right. The land which is conveyed into the barony confers a single heritable right? *A.* Yes, and they have a convenient single seisin of many discontiguous lands.

719. *Chairman.*] If the lands are erected into a barony there are important rights and conditions which go with it, are there not? *A.* Yes, that is correct.

Mr *Murray.*] And so far as the present case is concerned, this concerns the whole lands were erected into the barony and earldom.

720. Lord *Templeman.*] Looking at the translation on page 102, it does

feature the word " whatsumever ", which incorporates the land into an earldom? *A.* That is correct. That is simply incorporating the lands.

721. Therefore, you have to rely on the "*cum*" phrase with the style and dignity, because those are the operative words, if any, which create the dignity? *A.* The "*cum*" clause is the grant of the title.

Lord *Templeman.*] Yes, I follow that.

722. *Chairman.*] What point is in this passage starting "*Et similiter*"? You have got the grant of something new, not simply what existed before, and, as you said, the Charter of *novodamus* will give out what has been previously granted when it quite commonly added something else? *A.* That is so, my Lord.

723. Of course, not only the title of lands but of land acquired since the instrument of resignation. *A.* In the case of the lands recently acquired, if they have been, as they have been in this case, actually resigned, the first part of the *novodamus* is dealing with that.

724. Lord *Brightman.*] In other words, what follows after "*similiter*" you are saying would not be appropriate for anything previously resigned? *A.* No, my Lord, that is dealt with in the first part of the *novodamus* clause.

725. But this new grant is not dependent on any resignation? *A.* That is correct.

726. That applies not only to the territorial title but also it applies to the dignity, if any, which is granted? *A.* This applies to the dignity likewise and also to the erection of the barony.

727. Lord *Templeman.*] I do not understand this about resignation. The grant of the territorial earldom is set out in the earlier part of the deed. It wraps them all up? *A.* It wraps them all up.

728. And it creates the territorial earldom out of it? *A.* That is correct, my Lord.

729. Lord *Brightman.*] The new part not resigned is the territorial earldom because it did not exist? *A.* That is correct. The lands have all been resigned but it would not appear any dignities had been resigned.

730. If one is talking of territorial earldom, there was none before 1662. That was created by this deed. It was created in the *novodamus* clause of the deed, and it could not be created in the first part of the *novodamus* clause because it relates only to the regranting of that which existed and had already been resigned, and there was no earldom to resign? *A.* That is correct. It is the structure of the clause.

731. And it goes on after that passage we are looking at immediately to deal with other new rights conferred upon the grantee? *A.* Yes.

732. You say it is a new grant but it applies to the land and dignity. Are you saying the "*cum*" clause in this Charter in fact therefore gives rise to two dignities because it creates one, there having been no need to have a resignation in respect of the other? I hope I have put it effectively? *A.* From the position in the Charter, my Lord, that is the case. This is creating a new dignity, which is now territorial and linked with the lands, which is not a dignity that has been resigned and it did not exist before.

733. It creates a new territorial dignity? *A.* Yes.

734. And this type of construction has been used in other charters "*cum titulo stylo et dignitate*" as distinct from the grant "*concedendo . . . titulum*"? *A.* If you refer to the Colville Charter you will find the grant is given, and the dignity——

735. But there is a resignation in the Charter and there is not a resignation in this Charter? *A.* There could be. It is simply referring to it. That is a way of granting a dignity.

736. It was on the point of resignation. There is no case where a "*cum*" clause is being used to create a new dignity in those circumstances giving rise to two dignities using the "*cum titulo stylo*" instead of the type of one with the resignation being stated in the charter.

That is right, is it not? *A.* That is correct, my Lord. I do not know of any instances where there was no previous resignation of the dignity and creation by the "*cum*" clause. You must remember that conveyancing at that time was in a state of transition with many different wordings.

737. *Chairman.*] The use of "*cum*" is perfectly effective to confer the title of peerage dignity. You say it does not matter. The resignation is another point altogether, but the effect is that the title has been resigned. You find it granted out afresh by the use of the words "*cum*" and the ablative? *A.* That is right.

738. So in general you say conveyancing practice at the time, whether original or regrant, was quite effective? *A.* Indeed.

Lord *Templeman.*] What is the regrant? We have looked at minutes that end with a barony, and I can understand that. Where is one where it is a regrant?

Mr *Murray.*] You referred earlier to the *Earl of Crawford and Lindsay* case, and that is in the spare bundle of papers.

Chairman.] Is that the one that starts with the Act of Ratification?

Mr *Murray.*] Yes.

Lord *Scarman.*] Is it page 620?

Mr *Murray.*] Yes, my Lord.

Lord *Scarman.*] I have it.

739. Mr *Murray.*] I think, Professor, that the relevant part of the deed is on page 622? *A.* That is correct.

740. It is the part which is italicized? *A.* Yes. It reads: "*totas et integras terras Baronium de Piteruvie . . .*" Then something is not reproduced. "*. . . unacum cognomine designatione titulo honore et dignitate dicti comitis de Crawford et Lyndsay . . .*"

Lord *Scarman.*] I have not looked at the Crawford instrument, and if I did I probably would not understand it. Is this a *novodamus* clause or not? I do not even really know what the instrument is. I see the limited point of "*cum*", and I am wondering how to compare it with our Charter which contains a *novodamus* clause in the classical form.

Mr *Murray.*] I have given the reference on the first occasion to which this re-referred, but it would be in the first dispositive clause.

741. Lord *Templeman.*] Is this the case where the grantee started off with an earldom of Crawford and Lindsay and resigned it and was regranted it or is it a grant of a new earldom? *A.* The honours had already been resigned. This is not a *novodamus* but a regrant. I was referring to this only to make the point in granting or regranting using "*cum*" was a perfectly normal way of doing it.

Lord *Templeman.*] How do you know it is a regrant?

742. Lord *Scarman.*] I think you can tell that from the very opening lines on page 620: "Charles by the grace of God King to His beloved brother and cousin Robert, Count of Roxburgh Lord" of something or other and Cavertoun and so on. Further on it refers to "beloved cousin counsellor John, Earl of Crawford and Lyndsay, Lord of Struther" and so on. I think it is quite clear it was the Earldom of Crawford. *A.* It is my recollection as I looked at the Register of the Great Seal I formed the quite clear impression this was a regrant.

743. When you look at the words "*cognomine designatione*" and so on, what is specified as "*Crawfurd et Lyndsay*" his "*omnibus privilegiis*" and so on, but there is no reference to specify, as it were, what is his *dominus . . . et per prior* we referred to yesterday? *A.* That is correct.

744. Lord *Templeman.*] In Crawford, is there any reference to the resignation or any reason given for the regrant? *A.* It seems that the reason for the regrant, my Lord, was there was a very lengthy new destination and it was to give effect to that.

745. Did that after the original destination or not? *A.* I did not look back to the former one.

756. Lord *Campbell of Alloway.*] At all events, it did not create, did it, Pro-

fessor, two destinations with different terms? It did not create two different entities having diverse destinations? *A.* No, it did not.

Lord *Brightman.*] Is there a reference in this Charter to a resignation or not?

Mr *Murray.*] I think, if I can assist, if you look at page 623, Professor, we have the clause, which is itemised on page 623, and it was not suggested——

747. Lord *Brightman.*] There was a resignation? *A.* It suggests everything aforesaid had been resigned.

Mr *Murray.*] And one can see at the bottom of the page the words "*de novo dedimus*" and so on, and about eight lines from the foot of the page in the same passage "*Totas et integras predictas terras et baroniam de Pitcruvie*" and "*unacum cognomine*". That is the first grant on that occasion of the *novodamus* clause.

748. Lord *Brightman.*] This does not make it follow on this without an elaborate study. Could you refer the Committee to any passage which contains a reference to the resignation of the title and dignity? *A.* To page 623, the italicised page. It does not refer to dignity specifically but all the others aforesaid, and the dignities have been mentioned before.

749. Lord *Scarman.*] That is the *quequidem* clause? *A.* Yes.

Mr *Murray.*] So the position is that having recited in the earlier portion of the deed, we have the shorthand reference to the land and everything else being resigned.

750. *Chairman.*] You have a *resignation* in the third but last line of the italicized portion, and it has: "*et quequidem terre baronie tenandrie officia patronatus ecclesie decime*", and earlier it is "*Quequidem terre baronie tenandrie patronatus aliaque respective suprascripta*" and the other things particularly above it but no specific reference? *A.* No specific reference to the dignities.

Lord *Scarman.*] I have not looked at this document before and, therefore, on reference one just picks up what one finds a few lines further down: "*et legitime resignate fuerunt unacum omnibus jure titulo interesse*" etc., etc. Is there any resignation of the peerage dignity?

751. Mr *Murray.*] Could I suggest it is a "redestination of the above"? *A.* It could be a proper construction for the ordinary use of right, title and interest. It is not referring to anything separate. It is any interest in the lands usually, but it could be dignities here. It could be.

752. *Chairman.*] I would have thought a right of interest relating to certain lands could not possibly be anything to do with the peerage dignity. *A.* I quite agree, my lord. It is referring to rights of land.

Mr *Murray.*] But the position would be this: the reference to "other things particularly above mentioned" would be a reference back to the peerage dignities which had been particularly mentioned.

Chairman.] We are not particularly interested in construing this particular deed. It is really rather unhelpful to try and construe a Latin deed with a view to using it as assistance in construing another deed, but, as I said before, we are in danger of proceeding from the obscure to obscurities in the matter.

Mr *Murray.*] I think the point is to say that the grant in the *novodamus* is by the grant "*unacum . . . et dignitate . . .*"

753. Lord *Scarman.*] This is the only relevance of the use of "*cum*" or "*unacum*" in a dispositive sense. A. That is the only point. I apologise for not being *au fait* with the rest of it.

754. You often find "*cum*" with the ablative introducing a grant of particular importance, and one point you make in the report is that it is sometimes financial, and it is perfectly clear what is described must be the subject of a grant? *A.* If you have the word "*cum*" and it appears in a dispositive clause or a grant which is dispositive in its purpose, it covers a particular subject.

755. It may be descriptive, and it is a question of construction whether it is a

grant made or whether the words so introduced are merely descriptive? *A.* That is so. It could perhaps indicate only a pertinent. In conveyancing practice if you are going to use a "*cum*" clause, something merely to help to describe and not grant, it is a very dangerous thing to do.

Mr *Murray.*] You could use "*contineo*", and then you would not get the difficulty.

756. *Chairman.*] The careful conveyancer would not use "*cum*" unless it was clear there was a transfer? *A.* That is correct.

757. Mr *Murray.*] From the point of view of the conveyancer, is the use of "*cum*" and words in the ablative as effective for the grant as in the accusative? *A.* That is correct. "*Cum*" is as effective in the ablative as if it were an object accusative of the principal grant.

758. I think you have made the point already. In relation to the structure of this particular clause of *novodamus* one moves on to the words "*et similiter*" and from the regrant of the things which have been resigned to deal with new matters? *A.* That is correct.

759. Is the position this in relation to any clause of *novodamus* that it may have both functions to fulfil, that is the grant of things resigned and the grant of new rights which had not previously been in the person who made the resignation? *A.* Yes, the clause of *novodamus* has that double function.

760. Lord *Scarman.*] And that is beautifully explained, if I may say so, in your report, which we have, at page 79 and paragraph 3. Then you have the conveyance of the lands resigned and then the "*et similiter*" takes you on to the second part where you have a new grant, and it is interesting in our Charter with the first part you have conveyance back of the lands resigned and then you have two new things on your view of it, first the erection of the territorial barony, lordship and earldom, the lands erected into that and then by "*cum*" the title of honour. *A.* Exactly correct, my Lord.

761. Mr *Murray.*] I think we have already discussed the following part of your report, Professor Halliday. I think that the question of whether a resignation is essential to *novodamus,* and it would appear to me that if one is dealing with that grant for the *novodamus,* it is a fresh grant rather than a regrant. Resignation is a question which simply does not rise in relation to that. *A.* It appears it is not necessary that there has been a resignation in the case of an incorporeal right such as a dignity.

762. Lord *Scarman.*] Although I am beginning to see something emerging here which I did not notice before, it must be very significant there is no reference to the title and honour in the first part of the *novodamus,* since it seems to indicate that when we reach the title of honour, which we do in the second part, this is a new grant and not a return of something resigned with a new destination. *A.* The structure of the deed, my Lord, suggests exactly that.

Lord *Scarman.*] I follow that now.

763. Lord *Brightman.*] I am not sure whether I heard you correct. Did you say in the case of the grant of a dignity, *ex hypothesi* one already existing, a resignation is not necessary because of this incorporeal hereditament? *A.* The lands were granted under a charter where the grantor gave to the grantee exclusive right of possession and enjoyment. No two people can enjoy it at the same time, and if there were to be a regrant of the lands they had to be resigned into the hands of the superior and they had to be regranted. There could not be two people with the exclusive right of ownership of the same lands, but in an incorporeal right they could be, and where it was of the character where more than one person could have the title of a dignity, and then it was not necessary it should be regranted.

764. Then the incorporeal hereditament would exist in two persons? *A.* Yes, my Lord. There is authority for that in the case of another incorporeal right in the 17th century in the case of *Scot v. Archbishop of Glasgow,* where it was decided it was not necessary that it had previously been resigned.

765. It is only in the case where the dignity is to exist in two individuals that you are, or are you, saying that the resignation is not necessary? *A.* No, my Lord. What I am really saying is, it is impossible, although it is not usually intended of course but it is possible, that an incorporeal right, like a dignity, can come to exist in two different persons.

Chairman.] Mr Murray, although what the Professor says is interesting, he is not here to give us a lesson in law. You will no doubt have to argue the matters later. We have read the Professor's report with great interest, and we understand what he is saying in it. I suggest you should proceed by clearing up any points which may remain rather loose in the report because there is no need to go through it all line by line.

766. Mr *Murray.*] Very well, my Lord. Professor, I think there is one matter outwith the confines of your immediate report, and that is, have you examined the terms of the draft warrant and signature since you wrote your report? *A.* Yes, I have.

767. I think typescripts were provided to your Lordships yesterday of parts which were thought to be of relevance, and the photocopies of them are in the original of the first bundle of papers. Is it clear from looking at the docquet in the first place, Professor, that the docquet then under consideration so far as it was concerned makes no reference to any title or dignity? *A.* That is correct, no reference.

768. I think so far as it concerns the draft Signature to which that docquet was appended, the position is the same? *A.* That is true.

769. So that deed simply proposes to create the Earldom, etc., and go on to provide a place of seisin? *A.* That is true. There is no mention of dignity.

770. In case there is any doubt about the matter, if one is dealing solely with what has been called a territorial earldom, it is a matter which involves no question of dignity or honour? *A.* Not the earldom itself. It could be a proper description of all the lands gathered into an earldom. It could be used loosely referring to the dignity in any proper conveyance in which it is given, but if one simply takes the words used in the Charter or Signature, because we have one signature in the draft form and one in the form in which it was finally superscribed by the Monarch, the reference to earldom in proper conveyancing practice is simply a reference to the lands gathered together in that unit.

771. Yes, and I think it is a consequence in conveyancing terms that there is no style, title or dignity attaching thereto? *A.* No, it would not be construed as doing so. That is one reason for making the change. It is a very important difference. When this draft Signature was altered, the alteration plainly put in a reference to the dignity properly so called.

772. Lord *Scarman.*] In Scottish society would the territorial earl who did not have the peerage dignity be referred to as earl? *A.* I would not like to be dogmatic about it. There is a good deal of looseness of expression.

773. Is there any difference between a territorial barony and a territorial earldom? *A.* The earldom is much more important.

774. In jurisdiction? *A.* Yes.

Lord *Templeman.*] Has a territorial earldom been created without the grant of the dignity? Has it ever happened?

Mr *Murray.*] Perhaps you should look at the charters at the back of the illustrative charters in the bundle, page 32, for example, where we see the Signature for the territorial Earldom of Orkney, and it is clear it is the Viscount Grandison to whom the Earldom of Orkney and Lordship of Shetland is being conveyed, but there is no suggestion a title of earl is being granted thereby.

775. Lord *Templeman.*] My question was really, was he then left simply as that or did that also create a title or dignity in the same name and they could have done it in the same instrument or before or after? *A.* There was very often a creation of the dignity before.

Mr *Murray*.] If I may give evidence, there was never any elevation of Viscount Grandison.

776. *Chairman*.] I think it is right, Professor, the creation of a territorial barony without any title or dignity was extremely common? *A*. Yes.

777. And the territorial earldom was merely a more important type of territorial barony? *A*. That is correct.

778. Lord *Scarman*.] It does not help in this case, but there was an Earl in 1661, and if you are erecting his lands into a territorial lordship of some sort it would be natural to make a territorial earldom. *A*. There was already an earldom in this case from the Patent of 1661. What the Signature was apparently doing was to change the destination of the lands to bring in the heir female's family and give the dignity attached with the same destination.

Lord *Scarman*.] That is what it was all about, but it does not solve our problem.

Mr *Murray*.] On the other matter, Professor, if I may refer back to the words in the Charter and warrant with which we are concerned, it is this: we have been concentrating on the words "*cum titulo stylo et dignitate*" but it goes on with the phrase "*comitis secundum datas*".

Chairman.] At 255.

Lord *Scarman*.] Is it not a question of interpretation? I have thought from the beginning, although I misunderstood it at one stage, the words "*secundum datas diplomatum*" are particularly important, whether there is the title of honour or not. I know Professor Halliday is a distinguished lawyer, with whom I have discussed commercial law when he was in the Scottish Law Commission, but I have not discussed peerage law. Do we need his assistance on this?

779. Mr *Murray*.] The only question is if one is creating a territorial earl, is it done by Charter as in the present case or Patent? *A*. It is normally done by charter and the lands and the dignity together, yes.

Mr. *Murray*.] Thank you. My Lord Chairman, it might interest you to know there was an Earl of Orkney created in 1690.

Chairman.] My Lord Advocate?

Cross-examined by THE LORD ADVOCATE

780. Professor Halliday, I think you have assisted their Lordships by reference to certain other charters for the construction which you are suggesting for the 1662 Charter. Could I ask you to look again at the Kinloss Charter, and I think the Balmerinoch and Holyrood House Charters follow a similar format. If we look at the Kinloss Charter, page 3, on the first column some 12 lines down, do we find the words "*concessit dicto Eduardo*"? *A*. Yes.

781. So it is the King granting to Edward, the aforesaid Edward Bruce, what lands are set out. Is that correct? *A*. That is correct.

782. Two-thirds of the way down the second column do we find a reference to the resignation by I think the Abbot of Kinloss, and then the words go on "*et que omnia rex incorporavit*", and that must be all the lands he has incorporated "*in liberum temporale dominium*"? *A*. Yes.

783. At that point all that has been done is to grant the lands and then by use of the word "*incorporavit*" to incorporate them into what I would call simply a temporal lordship? *A*. That is correct.

784. Then does he go on to use the word "*concedendo*"? *A*. Yes.

785. So that is a repetition of the word "*concessit*" applied to the lands previously. Is that right? *A*. That is correct.

786. That is a repetition? *A*. Yes.

787. But it appears at this stage the word has to be repeated because it cannot be used under reference to the word "*incorporavit*"? *A*. Yes.

788. Can I just again turn to the Crawford Charter at page 623 and con-

sider with you the Latin there? At this stage I think we start the *novodamus* clause with the words "*Preterea nos cum avisamento*" about two-thirds of the way down. Is that right? *A*. Yes.

789. Are the words there in the *novodamus* clause some five lines on at the end "*de novo dedimus concessimus et disposuimus*" and so on? Do you remember that? *A*. Yes.

790. And the words are used again including the word "*concedimus*". Would I be right in saying that those verbs are verbs which govern the words some ten lines from the foot "*Totas et integras predictas terras et baroniam de Pitcruvie, etc . . . unacum cognomine designatione titulo honore et dignitate dicti comitis de* Crawfurd *et* Lyndsay"? *A*. Yes.

791. So would I be right in saying that the grant there of the dignity with the use of the word "*unacum*" is preceded by the verb, amongst others, of "*concedimus*" and words like "*de novo dedimus*"? I appreciate there of course it was a resignation. *A*. Yes.

792. If we turn to the Charter we are presently concerned with, could I just be clear about the words which we find in the *novodamus* clause, and I am referring to page 255, and again towards the top of the page we find the start of the *novodamus clause*: "*Et praeterea . . .*". Do you see that? *A*. Yes.

793. Then we find the verbs and "*de novo dedimus concessimus disposuimus tenoreq praesintis cartae nostra confirmavimus . . .*", and then the lands, as I understand it, the subject of the resignation? Is that right? *A*. That is correct.

794. Then one goes on to the words "*Et similiter*". Are the words which govern the grant thereafter different words and different verbs? *A*. Yes, they are different verbs. It is a new sentence, and the verbs are "*fecimus univimus annexavimus ereximus creavimus et incorporavimus*".

795. "*Incorporavimus*" is the word which we find in the Lordship of Kinloss as introducing the grant of the territorial barony. Is that right? *A*. Referring as to the uniting of them into a territorial barony.

796. So those are not really verbs of disposition, would I be right in saying, but rather verbs incorporating all lands previously granted under the words "*de novo dedimus*" and so on? *A*. The word "*incorporavimus*" is a word of grant, and the word "*creavimus ereximus*" in front of it is the most distinct word of grant in the language.

797. "*Fecimus*" is "we made", "*univimus*" "into one, annexed, created, erected and incorporated"? *A*. Yes, that is correct.

798. And this is the conveyance. Is that right? *A*. Yes.

799. Would I be right in saying the words "*titulo stylo et dignitate*" are covered by those verbs and by the verbs which appear in the part of the *novodamus* clause? *A*. That is correct.

800. If we go on with this, I think you have indicated it is coming on to new ground within the *novodamus* clause. If we go on to the next page, do we find at the very top the reference I think to the grant in relation to Moffat, which starts with the words "*Et praeterea*"? *A*. That is correct.

801. If we go some twelve lines beyond that, do we find the words of grant in relation to *baroniae* Moffat, which are "*et gubernatione dicti burgi omni tempore futuro cum potestate illis erigendi crucem foralem infra dictum burgum et damus et concedimus*"? Do you see that? *A*. Yes.

802. I may have gone on too far, it may be it is some six lines down where it is "*fecimus constituimus creavimus et ereximus tenoreq praesentis cartae nostrae facimus*". Is that right? *A*. Yes.

803. Then it goes on to use the words later on "*et damus et concedimus*"? *A*. Yes.

804. Just to be clear about it, then you say: "I think it is apparent the destination with the verb '*concessi*'

does not appear in this Charter in relation to a peerage dignity whereas it did in the Lordship of Kinloss Charter"? *A.* That is correct.

805. Could I be quite clear? What word do you say governs the phrase "*cum titulo stylo . . .*"? *A.* They are "*fecimus*" and "*creavimus*". Those are two of them, but all the words "*fecimus univimus annexavimus erexi-mus creavimus et incorporavimus*". Those are the words which govern what follows, where the "*cum*" clause occurs.

806. The reason I ask you this is that if one looks at the Lordship of Kinloss case, the King there appears to have thought the word "*creavimus*" was not enough to govern the grant of the dignity and there had to be another word to grant the peerage dignity in addition to the grant of the territorial grant? *A.* If it had been incorporeal, it would have been more than "*incor-poravimus*", which is not the way one would introduce the grant of dignity, the way one would unite the land into the granting of a barony.

The Lord Advocate.] I follow that, but the word "*incorporavimus*" is not by itself as it is in the relevant words of Kinloss, and you have the verb in the string of verbs, which is in accor-dance with titles of honour, because it means "create" and "*creavimus*" means to create a territorial earldom and also the title and honour, and I think "*cum*" is there because it is relevant to the verb "*creavimus*", which could have been on the Kinloss as "*creatione*" but it was not.

Lord *Templeman.*] It might be refer-ring to the word "*incorporavimus*".

Lord *Scarman.*] Yes.

The Witness.] The split of *et erexi-mus* is adding the dignity to the words.

807. *Chairman.*] These conveyances tended to be pretty lax with the verbs without any consideration of whether they were there for widening the lan-guage in which those charters were ex-pressed. We have the Abstract of the Charter which—— *A.* The Abstract usually reads accurately with the word-ing of the main charter.

808. So the main Charter of Kin-loss did say this in the ablative abso-lute? *A.* Yes, and that is in the record of the Charter in the Register of the Great Seal.

Chairman.] I see.

809. *The Lord Advocate.*] The last question I wanted to ask on this was, have you any other creation of terri-torial dignity which went along with a peerage, a present dignity in which the creation of the two together was ach-ieved by the use of those verbs here as opposed to the verbs in the Kinloss Charter or the Crawford Charter? *A.* The Ochiltree Charter is one example where it was a grant of lands and dig-nity with "*cum*".

810. And there were the words, the same used in the Ochiltree Charter, as were similar to the words governing the grant of the dignity, and I think it is page 13? *A.* Yes.

811. Would I be right in thinking that if you look at the Ochiltree Char-ter it starts with the words "*concessit et . . . de novo dedit*", and then the words "*terras dominium et baroniam de uchiltrie, unitas in unum dominium et baroniam cum omnibus honoribus et titulis*"? *A.* That is the language of the charter.

812. So the governing words appear to be "*concessit et de novo dedit . . .*"? *A.* Yes.

813. So it is fair to say the past participle of "*concedere*", "*concessus*", is the particular governing word, and you say that the word "*univimus*" you can find in this Charter? *A.* Yes.

814. So it is not the word "*creavi-mus*" but rather "*univimus*" which ap-pears to be the important one if one uses Ochiltree? *A.* Yes.

815. One last matter perhaps, just to make it quite clear; do you see what appears in the *novodamus* clause of the 1662 Charter, which is introduced by the words "*Et similiter*", as being read as one in the sense that it is simply creating an earldom, part of which is territorial and part of which is a peer-age dignity? You see what I am driv-ing at? *A.* Yes, the early governing

words are doing the two things—creating a territorial earldom and at the "*cum*" clause creating a dignity.

816. *Chairman.*] I cannot hear you, Professor. *A.* The governing verbs are doing two things — going on to create an earldom which is territorial and then with the "*cum*" clause going on to create a dignity and gather the two together, so a single seisin will do for all.

817. Would a seisin have been taken on a personal dignity, for instance, not — *A.* I do not know of a case where a personal dignity not connected with lands would have had a single seisin —

Lord *Campbell of Alloway.*] Would you not get a single seisin if you have a *concessit* — I do not see how your last answer, Professor, really clinches the point?

Lord *Templeman.*] I do not understand how that you can take seisin for a title of dignity.

818. *The Lord Advocate.*] How would you begin to grant a personal dignity by way of patent, for instance. *A.* The position is a little inconsistent or illogical. The situation was, you see, in Scotland there was a well-established procedure of taking seisin for lands. If dignitaries were to be granted they employed the same type of charter, but I do not say I know of any case where a dignity itself was granted and a seisin was taken for it. Something presumably had to be done, but I do not know.

The Lord Advocate.] I have no further questions.

Chairman.] Mr Murray?

Mr *Murray.*] I have no further questions.

Chairman.] That is all then. Thank you, Professor Halliday.

The witness withdrew.

Mr *Murray.*] My Lords, I invite the Committee to grant the prayer of this Petition whereby the Petitioner asks that Her Majesty should "admit his succession to, and declare him entitled to, the title, style and dignity of Earl of Annandale and Hartfell in the Peerage of Scotland and . . . direct that a Writ of Summons shall be issued . . ."

My Lords, there are two matters which principally arise. The first and a critical matter in our submission is whether the deed upon which I found, that is the Charter of 1662, conferred a peerage dignity upon the grantee, and the subsidiary question is whether the Claimant, if that question is answered yes, has established that he is the person who is now in right of that dignity.

My Lords, on that second question, having regard to the proofs which were produced, I would not propose to address my Lords unless my Lords feel it necessary for me to do so. Perhaps if my Lords can indicate, I could deal with that matter at a later stage.

Chairman.] You can proceed on the matter.

Mr *Murray.*] Your Lordships are satisfied. The pedigree contained in Lord Lyon's interlocutory falls to be considered in the circumstances. In Scots law a peerage dignity is a form of heritable property. I do not think there is any doubt about that, and a deed conferring or transferring the charge has to be treated like any other deed for the purposes of construction, and one has to proceed on the same footing: what is the language of the deed ; what does it fairly read?

I risk offending the House by stating certain things which to a Scot are perhaps better known than to others. In Scotland in the 17th century there existed two quite separate things, a territorial earldom and the honour or title of earl, and the two are quite distinct. Lands which were held by an individual could be erected into a territorial earldom, and that would have important consequences in the sense of giving the owner of a territorial earldom new rights not by virtue of the ownership of the land but by virtue of the territorial ownership of the earldom, and I think it has emerged this could be quite valuable in relation to certain rights, but it does not follow the owner of an earldom by the 17th or 16th century for that matter was an earl in the sense of a person enjoying the title and dignity and honour of earl. The holder of a

peerage dignity, as I shall endeavour to use in order to keep the distinction, of the rank of earl had a dignity which was albeit heritable transferred to him, in the sense that if there was a destination which did not enable him to choose the successor the peerage must turn to a destined order of succession.

In Scotland in the 17th century heritable property in general followed the defined order of succession, that is the Charter conferred the title on the particular individual, and there would be a succession for a particular line of heirs, whomsoever, or a particular line of heirs as specified. Some reference has been made to wills, but it would not be appropriate in relation to heritage or to the title. If a man wanted to change his will he could not do so by writing a will but by redirecting, and if lands were tendered up to the King for the purpose of regrant, perhaps for convenience (the Monarch invariably granted the destination required) so alienation without the consent of the King had become the norm, and his signature was a purely formal matter. In relation to a peerage dignity his consent would always be required in relation to any attempt to alienate his peerage dignity, and reference has already been made to the situation which arose after the Monarch moved to London in 1603, whereby the formal nature of the conveyancing of the land was recommenced by passing that sort of deed by cachet, so it never went to London at all, but new grants or grants relating to peerages did require the Royal supersubscription and did have to go to London.

The second point which I think has probably clearly emerged is that to many Scots of the relevant period their titles of honour and issues of precedence were very important to them. Coming now, if I may, more closely to the present matter, what we are concerned with here is a Charter of 1662 which, as has been explained, was a Latin language document which itself was signed by the King, and that which is signed by the King is a document known as a Signature, which was in a form of English or perhaps I should say a vernacular instruction by the King to the relevant authorities to prepare a Charter dealing with the matters which the Signature related to. The Signature was itself accompanied by a docquet, which was an abbreviated version of that which the Signature contained, and which would suffice to indicate to the Monarch and those immediately advising him to what the main purpose of the piece to which he was being asked to warrant the issue of a Charter related.

As the nature of the document, it is quite clear, and I do not think there is any dispute about this, right up until 1707 the technique of grant of peerage by use of a Charter remained a competent form of procedure. The question is, did this Charter create a peerage dignity in the individuals concerned. I rely of course upon a few lines in what is a very long deed but that is, in my submission, of no consequence. It is not the length of the material which matters but their proper meaning and content. It is very often the case, as I know from the Charter which deals with peerages and lands, that the description of the peerage very much lies encompassed within the remarks which have very limited particulars, as we have seen.

The structure of this particular deed has been before your Lordships already, and there has been evidence about it from both Professor Donaldson and to some extent Professor Halliday, and I think I am entitled to take the following points in relation to the deed. The first point is that the deed itself was entirely regularly passed and it had a reference to the dignity of an earl in each of the three documents to which I have referred, and that is of course the Latin language Charter, the vernacular signature and vernacular docquet which was attached to the signature. The place in the Charter in which the words are found is of course the Charter of *novodamus*, and Professor Halliday in our respectful submission has clearly demonstrated both in his evidence and report which is before your Lordships that the Charter of *novodamus* fulfils two quite distinct functions. The first function is that of the regranting of those things which have already been resigned, but it is also clear that it grants new, or maybe grants, I should say, new rights which have not previously been resigned.

Chairman.] One can read about this in the classic text-books, but the Charter of *novodamus* may grant out some new

subject as well as granting out afresh subjects granted before.

Mr *Murray*.] I am much obliged, my Lord. It is quite clear, in my respectful submission, to descend from the general to the particular, that grants of peerage dignities and charters of land where no peerage dignity existed before were created in this way, and three examples were referred to this morning, including that of Holyroodhouse. Those show in each case a situation in which land have been resigned by someone; they have been erected; they have been re-granted and erected into a lordship, but that of course is not a title and honour, and then further there has been added a title and honour.

There has been some discussion about the language used, as your Lordships have seen this morning. In several of the cases to which reference was made dignity was used in the title of honour and there is no doubt in my respectful submission this is a technical use. In one Charter you have reference to lands and then in the *novodamus* clause you go on to erect those lands and confer those rights which are made, and it further goes on to confer the peerage dignity.

So far as the present deed is concerned, the position of the words upon which I rely for the creation of a dignity are in the correct part of the deed for that purpose.

Chairman.] You can certainly say that this is in accordance with the sort of structure of deed of this character which was in common use at the time.

Mr *Murray*.] It might be appropriate at this point, before I turn to the structure of the deed itself, to enable your Lordships to look at one reference where a destination for the territorial earldom and title was briefly discussed in your Lordships' House in the *Earldom of Mar* case, 1875 Appeal Cases, page 1. I only refer to this for the reference to Lord Redesdale, the Chairman of the Committee, at page 26. It is a short passage at the foot of page 26 where his Lordship said this: "The evidence before us, shews clearly that when a peerage was attached to a *comitatus*, the holder of it was earl, and when a peerage was not attached, lord only. In the charter of Robert I, granting to his brother Edward Bruce '*totum comitatum de Carrick*,' he is made an earl by the following words: '*cum nomine, jure et dignitate Comitis*.'" That conferred the title, and the other words were merely to confirm the territories. "He died without legitimate issue. In the same page a charter of David II. Grants to William de Conynhame, '*totum comitatum de Carrick*' without those words, and in a charter of this William de Conynghame he is '*Dominus de Carrick*' only."

So the point seems to be clearly established that the granting of an earldom by itself did not confer the peerage dignity. Some such words as "*comitatum*" were necessary in order to confirm the granting of a peerage dignity.

Lord *Scarman*.] And the word "*cum*" was used.

Chairman.] Assuming no peerage formed with that name had been used before and the King grants lands and erects them into a peerage, then could it not be said that a certain name has not created a new earldom in this way, merely normally agreed in those circumstances?

Mr *Murray*.] In fact, I am reminded there had been Earls of Carrick before, and one sees after his death the grant of the "*totum comitatum de Carrick*", if those words did confer any dignity on his successor and thus the successor of the land.

My Lords, it is important to remember this in the present case (and there has been some discussion, my Lords, with the Lord Advocate about the wording about which I am concerned), the words are "a gift by the Monarch" of something "and include a right to the earldom, locality and justiciary". It has been pointed out from the use of the deed, and I am looking at the main text, 225, the itemised portion, what is being made or created is a territorial earldom, etc., dealing with the judiciary which has never been referred to, and those are being made and created in favour of James Earl of Annandale and Hartfell.

So there appears to be no doubt the words used are "gift or disposition" in fact of the territorial earldom, and I am reminded the creation deed goes on to

recite that the so created earldom is to have the name for all time to come of the Earldom of Annandale and Hartfell and Lordship of Johnstone, and then we have the words " with the title, style and dignity of an earl " and those words, in my respectful submission, are definite and explicit: it is with the title, style and dignity of an earl.

If one pauses at that point and reads this short passage, what one has got is a passage which says we create the earldom and certain lands in the favour of an earldom with the name of Annandale and Hartfell " with the title, style and dignity of an earl ". In my respectful submission there can be no doubt that the use of the word " *cum* " in the ablative is just as effective for things in a dispositive clause as the use of language in other formulae mentioned. It is also clear in this particular case what we are talking about is this said disposition, although for a title as well and dignity of an earl.

To say one creates a territorial earldom in favour of A is to make a heritable property in the title, style and dignity of earl and only that. To say one creates more for A is plainly to add another matter, not that which is already done, and that is precisely, in my respectful submission, the point sufficiently summarised by Lord Redesdale in the *Mar* case to which I have referred. I do not think it is necessary, having regard to the evidence, to go back to that. Your Lordships have the chapters to which reference has been made already in respect of that. That showed, in my respectful submission, that the phrase " *cum dignitate* " or equivalent words is no stranger in the context of peerage dignities. I do not consider that assistance, if assistance be needed, is found by consideration of the *Airth* case, and if one looks at the correspondence relating to the *Airth* case where the disposing words of the draft signature your Lordships will find in the *Airth* case in the second bundle at page 37, the particular disposing words were at page 38, which were relevant. Those words were of course the English, but as Professor Donaldson has told us, those would be transferred in the Latin, and the disposing words were " together with . . . " and so on, and the Monarch replies to that in his royal letter of 20th May 1680 (we are about halfway through the letter), and the Monarch says: " Although we have no objection against the late disposition made by the said earle to the said marquis in so far as concernes that earles estate and the pertinents thereof mentioned in the said signature (but on the contrary are desirous that the same may be made effectuall according to the tenor thereof) yet wee being unwilling to alter the setled course of succession of the titles of honour of the earle of Monteith and Airth and others contained in his patent, it is now our will and pleasure, and we doe hereby authorise and require you at the passing of the said signature, to delete the clauses relating to the disposing of the said earles titles of honour to the end they may remaine in the same state they were in before the said late disposition . . . " What we see from the draft is that the words " together with the style, title " etc. had been deleted. So that, in my submission, it is clear that formulation was good evidence of titles of honour, and it was necessary to delete those, failing which there would have been a good transference of the titles in that case.

Chairman.] There was not mention of the resignation of the title in the draft signature in this, was there?

Mr *Murray.*] Yes, my Lord. At page 40, which is actually part of the docquet — the deed itself is only partially reproduced — about twelve lines from the top one sees: " together with the style title of honour and dignity of earle of Monteith and Airth Lord Kinpunt and Kilbride Proceeding upon the resignation of the said William earle of Monteith . . . "

Chairman.] Yes. Does it mean the Earl of Monteith did surrender his peerage dignity and it was the end or do we not know?

Mr *Murray.*] Because no effect was given to this it remained in his line. My Lord will see——

Chairman.] There has been a separate resignation, I presume, and it may be it had not been taken into effect.

Mr *Murray.*] So far as the Monarch

was concerned, his concern was not that the title should be resigned but he did not want the settled course of succession of this title to be affected. Perhaps it is a reasonable assumption to say that no step had been taken at that stage which would have been effective to extinguish that, particularly because the title of honour——

Chairman.] You say, given that there had been a resignation, the Charter following on the signature would have been regarded as giving out the title new upon a different succession of heirs.

Mr *Murray.*] I am much obliged, my Lord. The matter can be put in this way: if one was dealing with a person who was a commoner, then the words in this case would plainly have sufficed by the language used at the time to convey the peerage dignity on the grantee. They could have no other conceivable meaning than the grant of a title of honour.

In the present case the person in whose favour those words are written already is designated Earl of Annandale and Hartfell, but the deed goes on to deal with another matter, which is after the word "*comitis*", so perhaps it is better to use the English translation, to use the words I should say of the Signature rather than my own at the moment, and the words are to be found at page 102 near the foot of the page: ". . . with the title styll and dignitie of ane earl according to the date of the said James earl of Annadaill and Hartfell and his said deceast ffather their patents granted to them thereupon . . ."

It is quite clear in my submission that those words relate to the issue of precedence, which according to the date of the patents, which are referred to——

Lord *Templeman.*] Could you tell me, Mr Murray, whether it was a precedence question in the 1661 Charter?

Mr *Murray.*] Yes, my Lord, it was. If it is of assistance I could refer to that.

Chairman.] I think it would be desirable if we had copies, which I do not think we have amongst our papers at the moment.

Mr *Murray.*] They are in fact there, my Lord, but they are not referred to.

Lord *Templeman.*] As to the translation of the signature, is that a separate document?

Mr *Murray.*] No, my Lord, there are references in the speeches which might suffice for particular matters.

Lord *Templeman.*] I do not want to put you to more trouble because we are going to have to refer to the two together.

Mr *Murray.*] Indeed, my Lord.

Lord *Scarman.*] The vernacular in the signature is not as easy to follow to the modern mind as is the Latin. It is quite clear if you translate it into modern English it would come out somewhat differently than the signature. The Latin is: *secundum datas diplomatum*— "According to the dates of the Letters Patent above granted to the said Cousin and Councillor James of Annandaill and Hartfell and his deceased father . . ." That is the way it is in modern English, which I think is a little clearer for a modern ear, although the vernacular in the signature means the same thing. I was misled when I first looked at the signature, and I only got the real sense when at your invitation I looked at the Latin.

Mr *Murray.*] Indeed, my Lord. In my respectful submission, those words put the matter entirely beyond doubt, because those words make no sense at all unless they are referring to a peerage dignity. There was no issue of precedence——

Chairman.] I think we will break off at that point and resume at 2 o'clock.

After a short adjournment:

Mr *Murray.*] My Lords, when we rose for lunch I had been inviting your Lordships to look in the Latin or English text at the words relevant "to the date of the said James earl of Annandaill and Hartfell and his said deceast ffather their patents granted to them thereupon", on page 102 looking at the words in the signature. My submission is that that provision makes it conclusive that what was being created here was a new peerage dignity, because if

no peerage dignity was being created no issue of precedence arose, more because the territorial earldom did not create precedence of any sort. So that since this deed could not create any question of precedence unless it created a title of honour, the only possible inference is that this is what is being done. As Sir John Anstruther observed two centuries ago almost, the words are nonsense if they refer to the estate only.

Chairman.] I suppose the reference to precedence could be descriptive; in other words, the whole thing means this as a matter of fact, " the title and style of an earl according to the date of the previous grant ".

Mr *Murray.*] The reference " according to the date of the previous grant " can only relate surely to the title and style of earl which is now being granted. The position was this, my Lord, the Earl of Annandale and Hartfell, as he was in 1662, had become Earl of Hartfell by succession to his late father in the 1650s, the Earldom having been created in 1643, and in 1661 by patent I shall be looking at with your Lordships. Surely, the creation of Earl of Annandale was made with a clause providing for precedence from the date of his deceased father's patent, i.e. 1643. So that the issue of precedence relative to the individual in question had already been settled, and no issue as to precedence arose in relation to the confirmation or creation of a territorial earldom. It is for that reason I submit, my Lords, that these words only have a meaning if they relate to the creation of a peerage dignity at this stage.

Lord *Templeman.*] They may be descriptive or dispositive, and if you are right they are dispositive, but if they are right they are doing it with their eyes open, are they not, they being the patents which granted a title to James Earl of Annandale and Hartfell, and in the 1661 patent, if you are right, they know all about that patent, and they are deliberately creating an entirely new title of Earl in the same chap with limitations which I am not sure we have not been into yet. I am not sure whether they were bound to diverge or could diverge or that in fact they diverged, but if you are right this is what the King deliberately did. That is the only conclusion. If you are wrong it is merely descriptive of what he has already done and "*cum*" in this context does not appear dispositive, and then it all fits in together, but you are coming on to 1661.

Mr *Murray.*] I am coming to that.

Lord *Templeman.*] If it were not for 1661 I agree it intended him to be an earl, and with the title of honour.

Mr *Murray.*] The point I am trying to make is that if one looks at these words in relation to this clause and says: " What possible purpose can those words serve in relation to this deed? ", the answer is they cannot serve any possible purpose in relation to this deed unless they are relating to the grant of a peerage dignity; otherwise at the very best they would be merely superfluous, because they are talking about on that approach the precedence conferred by a personal dignity which already existed which in no way would be affected by the grant of a territorial earldom. So it is not merely they are superfluous—they would be misleading in that sense—but I shall come on to this a little further, if I may, shortly.

Chairman.] You can say that if the deed was talking only about the existing Earldom and everybody knows what its precedence date is, there would be no need to say anything about it.

Lord *Scarman.*] It is the word " date " —that is your case. If it is just a reference it cannot be descriptive, because it would just be " as granted " or something of this sort, but here you have "*secundum datas*". That is the point?

Mr *Murray.*] Yes, my Lord, and the point I was about to make is that matter is re-emphasised, if I may put it in that way, when one considers the terms of the docquet, which is an important construction of this deed, for the obvious reason.

Lord *Scarman.*] Take it a little further: if the King was, as your submission is that he was, conferring a new earldom in a context in which there was already an existing Earldom of Annandale, it would be incumbent on him and his advisers to indicate whether the new Earldom was to take precedence from the date of

this Charter or some other date and, if so, which, and what he did was, because the existing Earldom was there and the grantee of all this was the existing Earl, to say the new Earldom will take effect from the date of the existing Earldom.

Mr *Murray*.] I am much obliged, my Lord, and as I have indicated in a sense that was the pattern which had been followed with this family or individual before in 1661. He had been given a new earldom and he was told that he could have the precedence dating back to the one that he inherited.

Lord *Brightman*.] Does it mean the precedence dates the date borne by the 1661 patent or that it is to have a precedence on the 1661 patent?

Mr *Murray*.] In our submission it would have the precedence of the 1661 patent, which when one looks at it turns out to be the precedence of 1643.

Lord *Brightman*.] And precedence in the plural because . . . ?

Mr *Murray*.] Because it records the patent of the individual and his father, so that takes one back to the 1642 grant.

Lord *Scarman*.] I do not know what the effect is, but to my mind the language draws attention to the dates of the letters of patent: "*datas diplomatum*", dates of the letters patent.

Lord *Brightman*.] It should be dates, should it, in the plural and not in the singular?

Lord *Scarman*.] I do not know how Scots write Latin, but I may be wrong.

Chairman.] The signature must be wrong. Is that the inference? Is there a typing error?

Mr *Murray*.] It may be it is a typing error or the way the vernacular used it at the time.

Chairman.] Of "dates" in the plural, were there different dates of precedence?

Mr *Murray*.] The position was there were two patents, the 1643 patent creating the Earldom of Hartfell, and the 1661 patent creating the Earldom of Annandale, and that is why it says "according to the dates of the individual and said deceased father, their patent", because there had been two patents, 1643 and 1661, already, and in 1661 the current Earl or first Earl of Annandale in the patent there had been conferred upon him rccedence, according to the date of his father's patent.

Lord *Brightman*.] Therefore, it ought to be "date" in the singular, ought it not, because the only relevant date is 1643?

Mr *Murray*.] It may be, but they may have wanted to go by both routes.

Lord *Scarman*.] I do not think it matters, but I doubt it. The Earldom of Hartfell of 1643 and the Earldom of Annandale first was 1661 and, therefore, the patent has the new Earl of Annandale and Hartfell "*secundum datas*", and as plural it must mean that his precedence remains exactly as it was before insofar as he was the Earl of Hartfell in 1643 and insofar as he is the Earl of Annandale in 1661.

Chairman.] You have this situation where James at the date of his Charter is Earl of Annandale and also Earl of Hartfell. Are you saying that whereas in the old days there were two Earldoms, one Hartfell and one Annandale, what has now happened is there is the creation of one Earldom of Annandale and Hartfell?

Mr *Murray*.] What is being created at this point is one peerage dignity of Annandale and Hartfell.

Chairman.] You are saying there is a difference between the Earl of Annandale and Hartfell and the Earl of Annandale and the Earl of Hartfell, are you or are you not?

Mr *Murray*.] I am not sure if numbers would help this. James was the Second Earl of Hartfell, because his father was the First Earl of Hartfell. He was after 1661 the First Earl of Annandale but still I suggest the Second Earl of Hartfell, but on my contention he also became by this Deed the First Earl of Annandale and Hartfell put together.

Chairman.] You are saying then that the Earldom of Annandale and Hartfell is something different from the Earldom of Annandale and the Earldom of Hartfell?

Mr *Murray*.] I am saying that the dignity conferred at this point is a

diffcrent one, and it is the dignity which is Annandale and Hartfell. It is necessary at that point to look at 1661, because there is or certainly was an argument what was created thcre was only, if I can put it in this way, the Earldom of Annandale and Hartfell or the Earl called himself thereafter from time to timc Annandale and Hartfell.

Chairman.] The fact is the two were separate before?

Mr *Murray.*] But he is described, for example, in this Deed——

Chairman.] If the title is Annandale and Hartfell that is something different from either Annandale or Hartfell. This is meant to be in your favour and not against you, you understand.

Mr *Murray.*] Indeed, my Lord, I understand. The difference had been what hc had to have was the Second Earldom of Hartfell and the First Earldom of Annandale, and what clearly happens at this stage is the amalgamation of Annandale and Hartfell.

Lord *Brightman.*] If that be so, that ncw Earldom can only have one date of precedence and, thereforc, it must be right, must it not, according to the date?

Mr *Murray.*] The reason why, I imagine, my Lord, it was put precisely in that way was so no dubiety could exist—together they go back to 1643.

Lord *Scarman.*] I believed we had been spending a lost of time on something inessential, but having listened to what you have said in the last five minutcs, I think the English in the Signature according to the date is correct and the Latin is the wrong translation. Whoever it was guided himself perhaps by thc sort of facts we are discussing, but thc English is correct aecording to the dates.

Mr *Murray.*] I do not think it matters from my point of view.

Lord *Scarman.*] I do not think it matters a bit, but it is rathcr fascinating.

Lord *Brightman.*] It is rather in your favour, is it not, because it is consistent with the new creation of a combined title?

Mr *Murray.*] I am reminded, and I do not wish in any way to mislead my Lords, that if one looks at the Deed of 1661——

Lord *Scarman.*] Which we have not done of course.

Mr *Murray.*] It does appear the title then created was Earl of Annandale and Hartfell, and this is page 7 in the small loose bundle of papers, the excerpts from the minutes of the previous hearing, the ratification, and in my copy of this it is the first document.

Lord *Brightman.*] What page number at the top?

Mr *Murray.*] It is numbered 7 at the top of the page, and there is a reference to a question, and the actual Latin text is at the bottom of the page and it has "Letters Patent creating James second Earl of Hartfell Earl of Annandale in the Peerage of Scotland" typed at the top.

Lord *Templeman.*] What do you say happcnded to the old Earldom of Hartfell? That was originally settled, was it not, and then you say there was the creation in 1661?

Mr *Murray.*] Could I give an explanation which I hope will be hclpful? In 1643 there was the creation of the Earldom of Hartfell, and the destination in that was male heirs, and according to the reasoned Scottish meaning of "male heirs" it meant male heirs whomsoever. In 1661 there was the creation by this Decd of conferring on that Earl of Hartfell the title of Earl of Annandale and Hartfell and certain other lesser titles, lcsser titlcs which the Earl of Hartfell had before.

In that Deed there was a destination which was in three parts: the first part of the destination was to heirs male without more qualification; the second part of the destination was to the eldest heir female and the heirs male of her body and bearing thc name and arms of Johnstone, and then failing all those the youngest heirs whomsoever of James Earl of Hartfell, the Patentee. The issue which arose in the proceedings in the last century was basically this: Can one construe the words "male heirs" in the context of this Deed as meaning heirs male of the body, because if it were so

then it was clear they were extinct and the next limitation to the eldest heir female opened and, indeed, would have been in my client's favour.

Lord *Scarman.*] It is allied to the famous speech by Lord Brougham in this House where he was prepared to accept *ex corpore dicti*—and then ten years later was persuaded by Lord Redesdale he was wrong.

Mr *Murray.*] He wrote a letter to the daughter of the current heir, a lady——

Lord *Scarman.*] Could you give me the 1660s' destinations?

Mr *Murray.*] The destinations in 1643 and 1661 I have already given.

Lord *Scarman.*] 1661 was male heirs...

Mr *Murray.*] And then heirs whomsoever, and in our present Deed, my Lord will see it at the top of page 95, the destination is heirs male which failing heirs female, and the heirs male of the body of the eldest heir female carrying the name and arms of Johnstone.

Lord *Brightman.*] There would be no point in describing in the 1662 Charter the old title as going along with the language that had just been granted because they diverged.

Mr *Murray.*] As soon as there was a failure of heirs male of the body there would be a divergence, and the use sought to be made before this House in the 19th century of the Deed, on which I am seeking to rely, was simply to try to persuade your Lordships it was proper to construe the Patent of 1661 in the light of this second Deed in order to infer into the 1661 Deed a limitation to heirs male of the body, amongst other reasons for doing so, the principal other reason being of course the argument which Lord Brougham eloquently expounds. If one has a limitation to heirs male whomsoever the fairly elaborate provisions in that Deed in relation to female are so much waste paper, because in a practical sense they could never be brought into operation. So the divergence between that which my Deed conveys and the grant of Petition of 1661, whatever that conveys, would have arrived at the point where the heir male failed, and that point occurred in the 18th century when the last Marquis died without issue.

Chairman.] So in a sense the Letters Patent are recording the Earldom of Annandale as something separate from the Earldom of Hartfell.

Lord *Scarman.*] It is a reference to the deceased father, because the deceased father had been only Earl of Hartfell, and the Second Earl of Hartfell became the First Earl of Annandale.

Mr *Murray.*] But it appears from the Latin on page 8 of the text he is to enjoy as Earl of Annandale that placed on the Earl of Annandale according to the Letters Patent granted to his deceased father as Earl of Hartfell. So the result of that was that having now got this title of Annandale, he still enjoyed the same precedence in regard to his fellow Earls which he had enjoyed up to then by virtue of the inherited Hartfell title.

Lord *Scarman.*] That suggests it is not one rolled up title of Annandale and Hartfell but one Annandale and one Hartfell was from the date of the Hartfell Patent.

Mr *Murray.*] I am reminded by the Lord Advocate that in his speech Lord Brougham at page 5 refers to the individual concerned as " the patentee, created Earl of Annandale in 1661 ", and that is when he is discussing the pedigree of the then claimant.

Lord *Templeman.*] My Latin is rustier than my noble and learned friends' and I would like a translation of the Letters Patent of 1661, because at the end of the day our task is to reconcile those two. I find it difficult to match up and the letter more difficult to translate when we are dealing with these abstruse problems. I am sorry to cause more trouble, but it is a difficulty, is it not: you have these two and you have to reconcile them?

Mr *Murray.*] My answer to that is that if my approach is right in a sense reconciliation is not important, in one sense, because I submit——

Lord *Templeman.*] I follow the argument, Mr Murray. For myself I cannot construe the 1662 document without the

proper English of what the 1661 document said.

Mr *Murray*.] As soon as may be I will make available a translation of the whole document.

Lord *Brightman*.] But we have established this, have we not, that there is only one date of precedence which is 1643?

Lord *Templeman*.] Where do I find that?

Mr *Murray*.] My Lord, at page 8, the second page of the photocopy of the 1661 Patent below the description of the new title set out in capital letters.

Lord *Templeman*.] I have the capital letters halfway down.

Mr *Murray*.] It is about five lines below that, my Lord.

Chairman.] You see "*anno domini*" and there is the date of 1643.

Lord *Scarman*.] So there is one date of precedence of 1643 and, therefore, that shows that the Signature has got it right but the Charter has got it wrong.

Mr *Murray*.] Because one arrives at the same date whether one goes directly or not.

Lord *Scarman*.] The Signature refers to the date and the Charter refers to the dates.

Mr *Murray*.] And the Signature is right in that date.

Lord *Scarman*.] Bearing in mind the Signature is what the King saw.

Lord *Brightman*.] And the Docquet got it right.

Mr *Murray*.] The Docquet got it right, which is in fact what the King read.

Lord *Scarman*.] The King has put his superscription?

Mr *Murray*.] Yes, but the point of the Docquet was so that the King could be reliably informed what it was he was putting his signature to.

Lord *Scarman*.] It is his crib.

Mr *Murray*.] In my respectful submission, it is important to appreciate in this case both the dignity of earl and reference to the date are inserted in the Docquet, and the Docquet is a very short summary, as one can see, of a rather long Deed.

Lord *Brightman*.] Is there any significance on the question of whether one new combined earldom has been created in the words "and to be for all time coming . . ."?

Mr *Murray*.] My Lord, that was the unification at that point of the lands.

Lord *Brightman*.] I beg your pardon. It is only territorial, I am sorry.

Mr *Murray*.] The point I wanted to make in this connection is quite simple. Here we have the Docquet, which is only some twenty lines long, and the reference to the dignity of an earl and the date of the Patent takes up two of those lines. In my submission that shows the importance being attached by the framers of the Docquet to let the Monarch know what he is dealing with. There has been in an early peerage case, the *Castles* case, reference by Lord Mansfield to the fact no reference to the dignity in the Docquet was a reason for holding that no dignity passed by Deed on which the attempt to find was made.

Lord *Templeman*.] There is nothing in here to tell the Monarch that he is making an entirely new grant which is not in conformity with the Patents which he has been told have already been granted to the Earl and his father.

Mr *Murray*.] My Lord, there is, because he is being told in line 2 that is to his heirs and assigns, and he is being advised that heirs are not restricted to males.

Chairman.] I doubt whether there is anything in that point. In 1661 we have "female failing males generally" as construed by this Committee on an earlier occasion, so the fact it is "heirs" in this Docquet does not convey to the King it is not the same.

Mr *Murray*.] According to the date of the previous Patent, it is to create an earl, and that is what he was doing. Those words have less significance if they were related only to the grant of territorial earldom. The man already concerned has dignities and precedence, and putting this into the Docquet is more a

work of supererogation that all that there in relation to the Signature itself.

Lord *Scarman*.] If the purpose of the Charter of 1662 was to change the destination both of the title as well as to grant a territorial earldom, it is strange that the document gives no indication to the King that the new Earldom is subject to limitation different from the old Earldom. The document is silent and tells you nothing about the fact there is a new destination.

Mr *Murray*.] I think the short answer I would make to that, my Lord, is that docquets never did so far as our researches go, that is they did not go into what the destination was. That was featured in the Signature if the matter they cared to have explored in that way, and it never mentioned in particular what the old destination was. Most of the matters which would go into the Signature one way or another would be related to a change of information or at least they were bound by their nature to set up the destination, and some such words as one has here were for that.

Chairman.] I suppose this would not come to the King out of the blue. There must have been some discussion beforehand and it must have been ascertained he was prepared to grant it.

Mr *Murray*.] In my respectful submission, that must be so, my Lord. It must have been ascertained he was prepared to grant it. In the *Airth* case we learn clearly it turned out he was not prepared to grant all that was being sought. Before any such matter passes the King one is entitled to assume it must have been discussed by the King and his advisers. In my submission it is impossible to believe that these words used in the Docquet or in the more expanded form in the Charter and Signature were not intended to achieve certainly the result of the grant of the peerage dignity.

In my submission, the matter is strengthened further, if one considers this fact: there has been recovered by those acting for me now (Mr Bogie spoke to the discovery of it) a draft Signature and Docquet, which relates to the same lands, and that draft can be dated to the period between February 1661 and July 1661 with reasonable precision, because it refers to the Earldom of Annandale and Hartfell, and Lord Hartfell had become that in February 1661 in terms of the Patent. It refers to William Bellendene who became Lord Bellendene in June 1661, and there is of course a photocopy of the complete text of these documents, but the photo-copies of the draft Signature or relevant portions and of the whole of the draft Docquet have been made available for your Lordships by Professor Donaldson.

If I might refer to the Docquet because it contains the relevant material, my Lords will see that that Docquet refers and only refers to the union and erection — I am looking at the first page of the English translation and about three-quarters of the way down where it speaks of " the union and erection of the said lands, lordships, etc., united in a free barony, lordship and earldom, etc., to be called the Earldom of Annandale and Hartfell and Lordship of Johnstone . . ." There is no mention of any question of a dignity and no question of any mention of a precedence.

The relevant portions of the draft Signature have been transcribed for your Lordships, and again on the first page thereof your Lordships will see that there is no mention of a dignity and there is no mention of any date of precedence. My Lords will also see that a destination of the property referred to in the draft Signature refers to the " heirs lawfully procreated of his body . . ." and other lawful heirs. That is about eight lines from the top of the transcript of the draft Signature. In the very last page of what has been transcribed, in the last two lines your Lordships will see: " It is resigned for the new investment to be made to the said James . . ." I think your Lordships have already noticed it was corrected in the Signature which finally appeared.

The point I want to stress to your Lordships is this: this Deed which can be dated only approximately to a period in the first half of 1661 relates to a grant of the lands by *novodamus* with an erection of the lands into the territorial earldom only. The Earl was already Earl of Annandale and Hartfell. He already enjoyed the precedence which had been fixed upon him by the Patent of

1661. When we come to what was actually passed by the Royal Signature in April 1662, we have the addition of these words on which I found, and in my submission it cannot be suggested or not reasonably be suggested that those words are simply added in the Charter and in the Signature and in the Docquet as a surplusage. They have been deliberately added, and in my respectful submission the only reason they have been deliberately added is to make sure that a title of honour went along with the heritable estate.

Chairman.] Can you remind me where the draft Signature and Docquet were found, where they were discovered?

Mr *Murray.*] They were discovered in the repositories of the Johnstone family in a set of documents of proximity to that period. Mr Bogie recalls he was looking for correspondence, and he did not find any correspondence but those documents.

Chairman.] The draft Signature creation did not correspond with the 1661, 1662 and——

Mr *Murray.*] There is a change in that it moves from heirs lawfully procreated or to be procreated, and this change to the words in the present Signature of "heirs male whom failing heirs female" and so on. and that is a change, and also by the addition of the reference to dignity and the reference to the date.

Lord *Campbell of Alloway.*] Is there any possibility that the Signature on page 58 by William Hunter could relate to this document, or is that just not on? If you remember, on page 58 there are those entries by the Signature of William Hunter.

Mr *Murray.*] "Item for drawing and formeing the signator of the Earledome of Annandaill and Hartfiell quhiwh was sent to London quherin ther was much more lands insert then in the former the haill lands erected in ane free Earledome and lordship and regalitie abowe 20 tymes w[rit]ine over £40.0.0" That suggests that there had been much revision involved in the document.

Lord *Campbell of Alloway.*] It could relate to this?

Mr *Murray.*] It could relate to this.

Chairman.] Does it really help your case materially that somebody or other made a draft which was subsequently changed? We have to construe the documents actually executed. It might have been a different hand that did the Docquet. The Docquet bears hardly any resemblance at all to the final Docquet, and the same with the draft Signature? Somebody had a shot at it and it was not a very good shot to be sure.

Mr *Murray.*] My submission is that it is important to remember the draft Signature was a very long document. Indeed, the changes only occurred in it to two very important parts thereafter, and my Lords heard the evidence of Professor Donaldson. He compared the Signature of 1662 and the document to which my Lord has just referred, and so far as the lands were concerned all the words were the same. In considering the meaning and effect of the words in the Deed, which my Lords have to construe, I am entitled to ask my Lords to bear in mind such evidence we have indicates that there was a deliberate change involving the introduction of those words.

Chairman.] I would not have thought the normal course of construction allows you to have regard to a discarded draft with a view to affecting the Deed actually executed.

Lord *Scarman.*] Before you leave totally this part of the case, you said I think very properly you will provide us with a translation of the material parts of the Letters Patent of 1661, and subject to getting that, I think it is a point which is open to you on the 1661 Patent, and here we do not have to decide the words of the actual Patent themselves, but there is no doubt at all the 1661 Letters Patent did create a new peerage dignity, and there is no doubt that there already existed in the Patentee a previous peerage dignity. He is the Earl of Hartfell and he was being created the Earl of Annandale and Hartfell, so to that extent here is a parrallel between the 1661 creation and that for which you contend in 1662.

There is the problem of precedence in 1661 as there was in 1662, and it is inter-

esting to see in what is apparently the creation of the new title or honour the words used though virtually a different meaning are precisely the same as "*secundum datas diplomatum*", and I think the words are (but you will correct me I know, if they are translated for us) on page 8, I think it is, about two-thirds of the way down: "After reciting the grant to the said count to hold in perpetuity the title honour order and rank, the dignity of earl lord of . . ." Now we come to the important words: ". . . so that as count of Annandale he may enjoy place "—that of course is the Latin word for precedence—" according to the Letters Patent previously granted to his deceased father the Earl of Hartfell in the year 1643."

That is in exact parallel language, slightly different and more expanded words as "*secundum datas diplomatum*" to the Earl, his father granted by the previous Letters Patent and, therefore, immediate precedence, and those words appear in the granting of a right of honour where there is precedence.

Mr *Murray*.] I am obliged, my Lord. You put it more eloquently than I could. At the same time, that is one of the most important pointers to the view on the evidence, which is only perhaps in one sense evidence of practice as to the use of the word "*cum*" by conveyances as compared to a grant in a dispositive case.

Lord *Brightman*.] Would you let me have a reference to the *Lord Mansfield* case? I do not think it is necessary to read it.

Mr *Murray*.] The reference I was going to give of the *Cassillis* case that is reported——

Lord *Brightman*.] Are you going to read it?

Mr *Murray*.] I was intending to read a short part, my Lord.

Lord *Brightman*.] I thought you were not going to read it.

Mr *Murray*.] I would ask your Lordships at this stage to look at one other aspect of the matter, and that is this: it may be said, is there a reason or motive for a change taking place since there is a different destination so soon after the grant in 1661. If one looks at the family circumstances such a motive plainly emerges. The factors in which some evidence has been laid before your Lordships and to which I would particularly raise the point would be these: the state of the Registers of Scotland were such it would not have been possible to deal with the Charter which was a major piece of conveyancing, however one looks at it, only about one and a half years or so, if I understand the evidence correctly, after the Restoration of the King in May 1660.

The first recorded resignation after the Restoration was on the 10th June 1661, and the resignation relating to the lands referred to in the Annandale minutes, and the effect was shown to your Lordships this morning, and it was on the 5th July 1661, so it was clearly an early Deed, but the point was the conveyancing machinery had not yet come properly into operation.

The circumstances of the family were these: by 1657 it was clear that the Earl who was then Earl of Hartfell was the only male in his family within four degrees of cousinship, and he had been twelve years married with two daughters. In 1656 the lawyers' memorandum to which Mr Peskett spoke on page 60 of the bundle volume 2, refers in its very last item, which is the minute of 13th March 1666, to this: "Item that my Lord dispone with the estait his titill of honour." In 1666 the Earl was already concerned to see that his titles ran one together, but in 1657 after the death of his brother he took the important step, albiet it may have been in the end a useless one for usurpers, that of making the resignation. That I am afraid is in the same bundle to which I have already referred, and I think it begins at page 63 in your Lordships' bundle.

Chairman.] What point do you want to make about this?

Mr *Murray*.] The point I want to make about this is that the state of the line of the Earl becomes clear in relation to his position, and your Lordships will see that if one looks at the first page, page 268, there is a reference there. He begins by saying that the diverse causes, and he then refers to the resignation of

his titles and dignities which he has held and also of the lands to be specified and set out.

Chairman.] Where exactly is it?

Mr *Murray.*] Page 63 in that bundle.

Lord *Scarman.*] I have got it, but not where you are on the page. It is at the top of the page, the italicized words.

Mr *Murray.*] The recital of the reasons which are moving the Earl to execute this Deed are, in my respectful submission, important evidence as to the attitude which the Earl would have in relation to those matters.

Lord *Beswick.*] That is 1657, which is before 1661. That was the 1661 consideration when he had all this on his mind.

Mr *Murray.*] The reason why it was inadequate is that the words " heirs male of his own body . . . "——

Lord *Beswick.*] Yet for three or four years he had been going into these matters.

Mr *Murray.*] He had given instructions at any rate which refer to this Deed, which showed that is what he was seeking to achieve.

Lord *Beswick.*] He wanted two bites of the cherry. Is that what you are saying?

Mr *Murray.*] Yes, it may be.

Lord *Templeman.*] In 1657 he made it clear he wanted it " heirs female " if you look at the resignation on page 271.

Mr *Murray.*] That is right, my Lord, but reading the thing through in detail it is " heirs male of his body " and then failing those " heirs female of his body ".

Lord *Beswick.*] What is your next date after the resignation?

Mr *Murray.*] After the resignation nothing happened in relation to that resignation until 1660 when we know the Earl was in London, and at the end of that year, he having had three further daughters by that stage, there was the birth of a son.

Lord *Campbell of Alloway.*] How is the attitude of the Earl relevant to what is admissible to construe the Deed and discover the attitude of the Monarch?

Mr *Murray.*] My Lord, these Deeds are granted by the Monarch on the basis of applications made to the Monarch to grant the Signature in the terms he does and, therefore, in my respectful submission, it is appropriate to have regard to both parties concerned. One party prepares the Signature and submits it to his Monarch through his advisers in order that the Monarch may grant the same, if so moved. Therefore it is my submission in that context of relevance to see what the attitude is.

Lord *Brightman.*] I find it a confusing point. The 1657 document says he has heirs of the body well in mind and in the 1661 Letters Patent ignores that point.

Chairman.] They bring in the heirs male point first and then the heirs of the body second and then heirs shown at the end, which is not a very satisfactory destination, but the Signature was prepared by the Earl's own advisers and it would incorporate exactly what he wanted. The Letters Patent of 1661 were by someone in London, who may have thought " heirs male ", and perhaps the King was in a hurry and he said: " Right, we have Letters Patent for the Earl of Hartfell. Let us do it," and the Earl of Hartfell, when he got them back, said: " This will not do."

Mr *Murray.*] In my submission it is a very plausible explanation of what happened here. It explains why there is this reference to the grant of a peerage dignity in 1662, which is clearly tied to the lands and which, I would submit, the earlier document is at least of some value to show what it had been always the intention of the Earl to achieve, and the suggestion that the Deed of 1661 is a Deed which in a sense was a blundered piece of conveyancing, if I can put it in that way, which was meant to be read with the Deed of 1662, is a view I can ask your Lordships, if necessary, to take.

Lord *Brightman.*] That is an attractive piece of speculation: the 1662 Charter and the ratification of the 1661 Patent.

Mr *Murray.*] This is clearly achieving what he has all along wished to do in relation to his lands. It is clearly achiev-

ing what he attempted according to the declaration of 1657.

Lord *Beswick.*] In relation to another speculation possibly in 1657 the Earl had in mind what he wanted to do when he brought the draft down to London and they said there was no need to make a provision in that way.

Mr *Murray.*] Having regard to the destination of the other titles granted at the time it is very unlikely. I think some little evidence was given that titles and destinations of very wide types were being given by the Monarch in 1660 and so on. In my respectful submission, a more reasonable assumption was what would have been done by Mr Hunter in 1660/1, and there was some evidence of Professor Donaldson of people qucueing up, as it were, to get this done by making a Deed, and in 1662 we have again the Signature, and the Patent would not have been prepared by the Earl's advisers, and the Charter and Signature was being prepared by the Earl's advisers.

Chairman.] Why do you say the Patent would not have been prepared by the Earl's advisers?

Mr *Murray.*] There is evidence Mr Martin was involved in relation to the writing of a Patent, whereas Mr Hunter appears to have been involved in relation to the writing of the Signature.

Lord *Templeman.*] I think, if I may say so, it is a very plausible explanation. The thing which seems to me to be in doubt is that if they got it wrong in 1661 and for reasons we do not know, I presume the draft must have been sent to the Earl and his adviser like a bolt out of the blue, and either thcy did not spot it or they thought they would have to put up with that, when we get to 1662 if he managed to persuade the King it was wrong and made a new disposition. I would have expected them to make it abundantly clear by them saying: "We are replacing or adding to the 1661 Patent". There is not a mention of it, and it is all done by the "*cum*" phrase.

Mr *Murray.*] Along with that is the reference to the previous matters.

Lord *Templeman.*] I see the force of that, but I would have expected more than that. If they had done that we would not be here arguing about it. They did it, if you are right, presumably with the King only by this very odd clause put in nine months later in what was primarily a grant of territorial earldom.

Mr *Murray.*] I think the answer I would make to that, my Lord, is I would suggest it was put in because it was a question of having the very means to create what had been perceived, and the way to do this was to make a grant in a Deed already under preparation and which had to be got through in order to deal with the lands in any event.

Lord *Templeman.*] If you are right it is in fact what they did, it is an odd way for lawyers, who were not lost for words in those days. When they made a resignation of lands they said so, and they were presumably in those days paid by the folio. Is it that you say this one replaces the patent or it did create a second carldom?

Mr *Murray.*] A second earldom, and I say that it does say so in clear words, and if we need to go outside those words to look at the set of circumstanees to see why it should be so, one can see an explanation for this evidence, the family circumstances of the settlement of the estates on the one hand and a clear desire by the Earl to have a title to run with his estates.

Lord *Templeman.*] I was I think following it more as a matter of logic. If you can satisfy me there was not any danger of the two Earldoms developing, if in fact the 1661 Deed said this and the King took the risk of not correcting the mistake, but presumably the Earl of Hartfell said: "I do not know anything about this, only I know the various dispositions under this document . . ."

Mr *Murray.*] If one looks at the document I am concerned with, one has words which, in my submission——

Lord *Templeman.*] I am fully appraised of that, Mr Murray.

Chairman.] One of the things the King did in the Letters Patent of 1643 was to create the Viscountcy, of which there is no mention in the 1662 Deed. Does that mean there is a Viscountcy wandering about under the 1661 Letters Patent which may go in a different direction?

Mr *Murray*.] Yes.

Chairman.] And what about the Lordship of Johnstone; when was that created?

Mr *Murray*.] In 1633, and that goes to "heirs male".

Chairman.] Heirs male generally?

Mr *Murray*.] Yes.

Chairman.] Supposing the Lordship of Johnstone is created in 1633 and then the Earldom of Annandale and Lordship of Johnstone is created with a quite different destination. Does that mean the same?

Mr *Murray*.] If one comes back to a Member of your Lordships' House, Lord Tolworth sits in the House, and the second Lord was created Earl of Marchmont and Lord Polworth with different destinations in the late 18th century. The Marchmont line died out and Lord Polworth's family is in abeyance at the moment.

Chairman.] You mean is dormant?

Mr *Murray*.] Yes, it is dormant, but clearly it has gone off in a different line, and if someone can establish their title to it—if I can take an example from the titles in what I shall call loosely the Annandale batch, it is clear that the very early ones were male heirs whomsoever. If the contention of Lord Brougham, initially favoured in 1834, had been correct, then the result would have been that there would have been probably two Earls of Hartfell depending on how one considers what was created in 1661, and certainly two Lord Johnstones because of the title in 1661 patent; in other words, it is not at all uncommon, particularly in Scottish peerages, when someone is elevated to a rank of the peerage he was granted not only that rank but the junior title, which may be a title he already holds, and the first grant and the second grant proceed in different directions.

Chairman.] It certainly seems to be the position that when the King gives somebody a peerage of higher rank he also mentions in the creation the earlier peerage of lower rank.

Mr *Murray*.] It is not always the same.

Chairman.] It would seem to open the possibility that if the higher grant is of a different destination somebody else could come along and say: "I am entitled to the lower grant".

Mr *Murray*.] One of the examples mentioned in the appendix was that there are two Earls of Kincardine, simply because the Marquis of Montrose was created Marquis of Montrose apparently with the Earl of something, and he took and used the title of Earl of Kincardine, but there remain two titles. In the Queensberry family this is what happened with a number of titles. There is the Dukedom of Queensberry and Marquessate of Queensberry, and those were originally held by the same individual in the late 18th century. On the death of the relevant Duke of Queensberry, one title went in one direction and the other in another, and some of the subsidiary titles in different directions. So it is not unusual that with the creation of someone to a higher rank the result is that two sorts of titles diverge, and I am again reminded of the Earl of Mansfield as a good example. Lord Mansfield was created Earl of Mansfield with a destination which went to his niece and a different destination which went to his son on his death, and on his death the two separated. In fact by reason of subsequent deaths they came together again.

Lord *Brightman*.] It remains the case nobody can offer an explanation why in 1662 anybody should have wanted there to exist two Earldoms of Annandale?

Mr *Murray*.] The Earl of Annandale wanted a title to go with his lands and a title to go to his family if he had no heirs. In 1661 he had a little boy in December of the previous year, and all we know about that little boy is he was baptised in December 1661.

Lord *Brightman*.] That would not explain why anybody wanted two Earldoms to exist side by side.

Mr *Murray*.] It would explain why, my Lord, the creation of a peerage in 1661 was important if Lord Annandale feared he would have nothing for his daughters. There is also this point in the creation I am concerned with of 1662: the references are for the personal services of the individual con-

cerned and his father, and it is not unreasonable as an act of consideration to take the view that what the Monarch is regarding is the personal circumstances of the current Patentee or the person to whom the Patent is granted, which would follow down the line then, as opposed to creations which are for anticipated services of the whole clan or whatever over a whole period.

This point was taken up in earlier Annandale peerage hearings by Lord Lyndhurst. He was referring to the 1643 Charter, which purported to be for the Johnstone family over a long period of time, and he said it was a pointer of construction which did not restrict it to a descendant of a particular individual. In my submission, he is pointing there to the contrast of what one is seeking to reward, which is I suppose the service of a particular individual, and to give him an inheritable peerage.

Lord *Templeman.*] In 1660 the Earl is in London, on the 17th December James is born, 13th February 1661 the Patent and 23rd April 1662 the Signature, and you think James died somewhere between 1660 and 1664?

Mr *Murray.*] My Lord, I think I can go a little further than that.

Lord *Templeman.*] Possibly when he was baptised?

Mr *Murray.*] He was baptised.

Lord *Templeman.*] As one of the witnesses shrewdly said, it may be an indication he was in failing health.

Mr *Murray.*] As regards the 1662 Charter and Signature, and it is a point Profcssor Donaldson drew attention to, if one looks at the Latin of the Charter and the destination one sees there the words "haeredibus masculis legittime procreand". Just before there you will see "*haeredibus masculis legittime de corpore suo procreat seu procreand Quibus deficientibus haeridibus femellis sine divisione hactenus procreat vel procreand*", which literally translated means "gotten which to be gotten and failing female heirs without division or already gottcn or to be gotten", and "*hactenus*" is "still there".

Chairman.] But you still have the past participle in relation to the male line. Can you draw such a strong conclusion?

Mr *Murray.*] One can. One has exactly the same family in 1657, and the words of Professor Donaldson were "gotten or to be gotten or as well", irrespective of the state of the female concerned. "*Haeridibus*" is drawing a distinction. He pointed out it was a most unusual word to find in this Deed, so it seems to be a distinction drawn signifying the existence of females.

Lord *Campbell of Alloway.*] Following the point of Lord Brightman a moment ago, could there have been any conceivable point in the creation of two separate dignities each having different destinations, one of a territorial nature and one for the dignity, at that time keeping them separate and distinct? Could there have been any object or point in this or have I got the wrong end of the stick? I do not understand the common sense of it according to the custom and practice at the time. I may have misunderstood the position.

Mr *Murray.*] The point, my Lord, is simply this: the Earl, we have seen, wanted to keep a dignity in his own family. If in 1661 what he had got did not on examination achieved that end, then he wanted a dignity which would descend in the event that he did not turn out to have male heirs of his own but one or other of his daughters. That would not be achieved by the dignity which was granted in 1661, because in the event of no male heirs, which I suppose is the inference of the Latin as an actual situation at the time of the Charter of 1662 his youngest male heir was a remote cousin, fourth generation——

Lord *Campbell of Alloway.*] Would you not expect the Earl wanting it to say: "I will resign the title of honour as well as the land"? I am right in thinking, am I not, in his instrument of resignation in 1657, when they were equally concerned about destination, there was a resignation of the title of honour as well as the lands? One would have thought it to be the way to handle it. Indeed, at one stage, particularly looking at the lawyers account notes, I was inclined to think it was perhaps nearer the truth but, as the Lord Advocate has reminded us, it is not your case.

Chairman.] I suppose you say: "There may well have been a resignation but I cannot prove it and, therefore, it may have been the position in actual fact a new title was created, and there is nothing against that in law. It may be a completely artificial view of the matter, but there is" as you say "a right". As we can see, you can create two titles in the same name. "There is nothing wrong with it in law, and this 1662 Charter is perfectly good and it does not matter about the 1661 one."

Mr. *Murray.*] Putting it briefly, that is the position I adopt.

Lord *Scarman.*] That is the way you put it, is it not?

Mr *Murray.*] That is the way I put it. It seems right this lawyer's paper should be put before your Lordships. It is difficult to draw a conclusion one way or another.

Lord *Brightman.*] The resignation may or may not exist, but you do not have to prove it existed?

Mr *Murray.*] No.

Lord *Scarman.*] Let us put it in this way: "I am making a submission and I draw strength from the Signature." You say that looking at it it grants a title of honour. The question to you is, is it not absurd that this should be added, a new title of honour, to one as recently created as 1661? "It may or may not be, but that is no objection to the second grant, because if that absurdity did arise it is one that is contemplated and can be found parallels for in Scots law." If somebody says: "Must there have been a resignation of the title in 1661 and therefore any lands?", you say: "There may well have been. I cannot prove it one way or another."

Mr *Murray.*] Broadly speaking, that is my position. What I am saying and have been saying for the last 20 minutes or so is that from the complete circumstances of the Earl it makes sense, given there could be a grant in 1662 of a peerage dignity, and one can see from the point of view of the Earl and his expressed desires it made complete sense. There is no dispute he was enjoying all the titles created and extant, and if he had a son then that son would enjoy all the titles created and extant because the difference in the two destinations in 1661 and 1662 is the temporary absence of the phrase "male heirs of the body". If it were not, those would continue to be enjoyed, and so far as the male heirs were concerned it was academic. If there were a failure of heirs male of his body it did not matter because the estates were still destined in the way he mentioned, and the title of Earl of Annandale and Hartfell would go along with them.

I am reminded in Scotland if any question of descent arises it would be possible for the Monarch to change the name of a peerage dignity, a case being Morton changed to Nithsdale when it turned out that there were two Earls of Morton.

My Lords, I think that I have already traversed in the last few minutes what I had proposed to deal with as the next topic, which is the fact that the Monarch can create a peerage dignity of the same rank in an individual who already possesses a peerage dignity of the rank. If you can see it without going outwith the bounds of this case, the Earldom of Hartfell was granted to James's father, inherited by him, and a further Earldom conferred on him in 1661, and I think it is a fact that there is nothing in Scots law to prevent the same name being attached to the second title of honour as has been attached to the first title of honour.

Reference was made, and I do not think I need worry your Lordships with it further, to the Earldom of Mar case, but there the question was, was the individual already entitled to the title of the Earl of Mar In this House in 1875 it was so held by grant in the 16th century the much older title of Earl of Mar, held by a Parliament to be held always in existence, and it proceeded in a different direction, and Mr Goodeve-Erskine, who had been a contender in this House, was restored. The only reason why it took the Parliament to do it was the avoidance of doubt.

Chairman.] The Committee of Privileges decided Mr Goodeve-Erskine had established his right to the Earldom of Mar and the other claimant had established his right to the Earldom of Mar as granted to his ancestor by Mary

Queen of Scots but an Earl as well in 1885 by an Act.

Mr *Murray.*] That is right, but there was the creation of the Earldom of Mar by that process.

Chairman.] They held that the Monarch at least thought that the Earldom of Mar was extinct and made a new grant in 1565.

Mr *Murray.*] What Parliament did was for the removal of doubt to make it clear Mr Goodeve-Erskine was restored to the position relative to the more elderly Earldom of Mar.

Chairman.] It turned out that the Monarch was mistaken in thinking another was entitled to it, and an Act of Parliament approved it.

Mr *Murray.*] There we have a position in which the Monarch plainly properly conferred a second dignity on someone who was entitled——

Chairman.] He was the Earl of Mar. She did not grant the title again to a person already entitled to it.

Mr *Murray.*] My Lord, that is what she did there.

Chairman.] No, it was somebody else entitled to it.

Mr *Murray.*] No, my Lord.

Chairman.] You mean to say in 1565 he was entitled?

Mr *Murray.*] Yes, my Lord, and it was a common ancestry for both claimants.

Chairman.] Did he get his title in 1565 with a diffcrent destination and that is how it came about?

Mr *Murray.*] Yes, my Lord, and Queen Mary followed it. She conferred a second title with the same name but a different destination on someone who was already entitled to that title but with a different destination. I do not want to weary your Lordships, but there are many other resignations and the creation in one individual of separate titles with two separate destinations. I have already referred to Mansfield more than once, and there is the creation of the Duke of Fife, the first being at the time of his marriage with a destination of heirs male and the second in relation to the destination of heirs female and his daughter.

Chairman.] Perhaps we can look at that briefly.

Mr *Murray.*] Yes, my Lord. The Fife documents are contained in the illustrative charters from the Public Records Office, and I think typescripts were provided for your Lordships, because although written in the 19th century they are still in handwriting which may be difficult to read. (*Documents were handed in*) My Lord, the first creation was in 1889, and indeed it does two separate things. It begins by creating him Marquis of Macduff, and then on page 3 refers to the giving to him of the style, title and dignity of Duke of Fife, and the destination is to be found about eight lines from the bottom of page 3 where it says " Alexander William George Earl of Fife and his heirs mal: . . . " That is on page 3, my Lord, towards the foot of the page. This is a document dated 29th July, 1889, on page 3 referring to the dignity of Duke, and the destination is to be found seven lines from the bottom of the page where it is said: " We do give and grant . . . " There were two destinations and his heirs male.

Chairman.] Where are they aforesaid at a point in the document?

Lord *Templeman.*] You have already the Dukedom of Fife, and there it refers to " males aforesaid ".

Mr *Murray.*] And everyone successively. The next one, which is 1899, refers at the foot of page 1——

Lord *Templeman.*] I have not got that.

Mr *Murray.*] The second document is the Letters Patent of 1899, and at the bottom of page 1 it is the Earl of Macduff made into the Duke of Fife, "and the heirs male of his body lawfully begotten and to be begotten for ever by his marriage with our great granddaughter ". There follows later on in the Deed, my Lords, similar provisions relevant to the dignity of Duke, and the interesting point my Lords will see

is that the first destination of the creation of Duke was to the heirs male of the Duke begotten or to be begotten and the marriage was not specified. If he had married a second time and not had heirs male by the Princess that peerage would have descended to the children of his second marriage, whereas the second peerage and Dukedom was one confined to the male children to be begotten by his marriage to the Princess and failing this to the daughter of that marriage. So it was clearly possible at least there would be a split if the Duke had a second marriage, and perhaps the first Dukedom of Fife would have gone to the offspring through the daughter of the first marriage.

Chairman.] You say that having conferred the Dukedom of Fife on Alexander William George she did it again ten years later with a different destination?

Mr *Murray.*] Yes, and it would have been quite possible had Princess Victoria died at the appropriate time to have two wives who will become Duchesses of Fife and their sons to be Dukes of Fife in their own right.

Chairman.] This is done by Her Late Majesty Queen Victoria. Was the law appropriate at the time of the union?

Mr *Murray.*] As regards the title of different destination is concerned, the Monarch was able to do it in Scotland in the Mar case.

Lord *Templeman.*] Does it not mean a Dukedom of Fife could go in two different ways?

Mr *Murray.*] In the first case he was already Earl of Fife, and I understand the peerage was also made of the Marquis of Macduff and also the Duke of Fife, and those were titles with destinations to his heirs male.

Lord *Scarman.*] Where is he made Duke of Fife?

Mr *Murray.*] He is created on separate pages Marquis of Macduff to begin with and the on page 3 he has——

Lord *Campbell of Alloway.*] On the question of succession and determination of heirs and heirs male, how are those documents governed, by concepts south of the Border or concepts north of the Border?

Mr *Murray.*] My Lord, I think that particular issue has not yet arisen for determination. There have been writings which suggest where a territorial designation which is clearly north of the Border is used Scots law would apply. I do not think the matter has been decided in any way. Looking at the words used, whichever system of inheritance one looks at, there is a plain distinction between the two peerage groups and it offers the possibility that there would have been as a result different dukedoms. There was certainly two dukedoms held by one man, and there was a possibility both would survive him and go off in different directions.

Lord *Scarman.*] After 1889 the possibility of two Dukes of Fife?

Mr *Murray.*] Yes, my Lords. I have not sought to amplify this by example. Some of them are rather difficult and I think would be time-consuming. In my respectful submission it is quite clear in the practice of peerages it has happened from time to time that the same title and dignity has been conferred on an individual who has already that title and dignity, and it may be the two will diverge at some time.

Lord *Templeman.*] In 1889 the Marquis was made into an Earl and had settled on him Duke of Fife and on his male heirs of his body on the marriage to Princess Louise. What happened after that?

Mr *Murray.*] After that, if one turns to page 4, he is advanced to the position of Duke of Fife where it begins " Moreover . . . "

Lord *Templeman.*] Should then the heirs relate to the same as that of the Earl?

Mr *Murray.*] It relates to the heirs male of his body with the Princess, and Lady Alexandra Macduff, who was his existing daughter, and I think as a matter of history, as you know, the present Duke of Fife has inherited that title which did descend.

Chairman.] Lady Alexandra Macduff was already in existence?

Mr *Murray.*] She was a daughter of the marriage to the Princess.

Chairman.] Yes, indeed.

Lord *Templeman.*] It would only have mattered if he had remarried, had a son and no sons by his first wife?

Mr *Murray.*] The importance of the second one was to preserve the dignity ——

Lord *Templeman.*] Which could have been done until he had one——

Mr *Murray.*] It was " heirs male " of his body.

Lord *Templeman.*] He did not have a son by his first wife?

Mr *Murray.*] Indeed, but the fact remains that was the effect of the grant.

Chairman.] Lady Alexandra dies, Princess Louise dies, the Duke, Lord Marduff, has a son who takes the Dukedom under the destination of 1889, and in the meantime Lord Alexander takes the Dukedom under the 1889 Patent?

Mr *Murray.*] Yes, my Lord, that is the position.

Chairman.] However, it did not happen.

Mr *Murray.*] It did not happen, my Lord.

Lord *Templeman.*] I dare say they would have sorted it out if it had.

Chairman.] Yes.

Mr *Murray.*] I have referred already to the effect of this Deed (" this Deed " meaning the 1662 Signature), which refers to the services which have been rendered by this individual and his father, and that, my Lords, you will find on page 100 of the print, if I can refer to it in the Signature, and it comes near the bottom of that page. I want to make it clear that it is clear from the Deed the King was granting this dignity for the personal service of the individual and his father and, as I said earlier, it is an aid to construction for a possible case that the dignity is meant or may be meant to relate to individuals rather than the clan.

Chairman.] It is perhaps not very apt to see something which is a mere translation or alteration of something that the grantee already holds?

Mr *Murray.*] Indeed, my Lord. At this point I would wish to summarise my view, if I might, that the words in the Latin text in the 1662 Signature are apt, as a matter of the proper construction of those words, to confer a peerage dignity upon the grantee and that no other meaning can properly be given to the whole phrase that refers, as it does, to precedence, and that there is nothing in the Deed which would take one from that position. There is nothing in the peerage law which suggests that it is incumbent in any way to do this and that therefore on a proper construction of the Deed the grant to the Claimant is made out, and the surrounding circumstances to which I have referred in my submission merely give an added point to that submission.

Chairman.] Generally speaking the law there of *novodamus* was invalid if it were not preceded by a resignation. Is that not right?

Mr *Murray.*] That is right.

Chairman.] But Professor Donaldson in his report makes the point that section 4 of the Act of 1887 alters the law in that respect retrospectively.

Mr *Murray.*] There are two points there. My Lord has the point he made if it is a new grant it would not anyway be referring to it earlier, and the Act has taken it into account in that it would be in the *novodamus.* No mention was made of the previous resignation.

Chairman.] That would not apply anyway if it were something new and not something old. You say it was a new grant?

Mr *Murray.*] Yes. If I have to fall back on the absence of resignation, then I do so.

Chairman.] That is Professor Halliday's point, is it not—absence? It is barely consistent with your case as applied to the significance of absence of any application on the basis what was being granted was the old peerage granted first.

Mr *Murray.*] This is a matter which ought not to arise if my primary construction is correct. My Lords, the issue has been raised in discussions in the previous two days of precedence, and I think all I would say about that is this; that it is clear if there were two per-

sons with the same precedence related to the same date then there were in contemplation of the Scots law, and the peerage rules have settled no distinction between them. The matter was dealt with by Sir George McKenzie who wrote in 1680 and Question 21 of this form, of which I have a photocopy, and the relevant page has been lodged with your Lordships. I am reminded that the full title is "Observation on the Laws and Customs of the Nations as to Precedence", but the question which was posed there, this is in the competition between the two who are advanced at the same time and different rules—if two titles were submitted by His Majesty to two separate Earls on the same day which of the two were to be preferred. The learned author discusses the matter over the page and basically comes to the conclusion His Majesty would be the witness to whom one would refer in order to determine which of the two Petitions had been determined if he is still alive. So again, in my submission, no question of precedence would arise because it would be for those who took from one of the earlier titles and for precedence from those who took over the second titles.

Chairman.] If there is right, and there would be a problem with the precedence, the possibility of a problem with the precedence is not an argument against you?

Mr *Murray.*] All I am pointing to is it is a non-problem in any event, because there were at that time in Scotland rules for dealing with matters.

My Lords, I have two other matters I have to raise before your Lordships which are quite different. The first relates to the question of *res judicata,* which was raised in the case.

Chairman.] You are going on to a new topic, and I take it there is no question of your being able to finish in the next half-hour or so. My noble and learned friend has another engagement. I think we will break off now and resume tomorrow at 10.30.

Adjourned until tomorrow at 10.30 *am*

Thursday the 20th of June 1985

Lords present:

Aberdare, L.
Beswick, L.
Brightman, L.
Caccia, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair

Counsel and Parties were ordered to be called in

Chairman.] Before finally parting from the "*cum titulo*" point, you might like to deal with some remarks of mine in the *Oxfuird* case which perhaps have a bearing on this point.

Mr *Murray.*] Yes, my Lord. Could I remind my Lords of what was said by my Lord Lord Keith in that case? I am looking at the Report at page 117: "[The Charter] bears to grant '*totas et integras terras et baroniam de Cranstoun McGill*' together with various pertinents of these lands ('*cum turre*' etc). Finally there appear the words '*ac etiam cum titulo et dignitate vicecomitis de Oxfoord*'. The Viscountcy is not made the object of any dispositive words but is treated as thought it were some sort of pertinent of the lands. Although the Viscountcy had been settled so as to follow the same destinations as the lands, it was a separate subject of great importance. So, if this Charter, running in the name of the King, had been intended to make a fresh grant of the Viscountcy, I would have expected it to make the title and dignity the object of some express words of grant."

The observation I make on that is that each deed requires to be considered according to its own terms, but I think it right to point out that as far as I can see from an examination of the *Oxfuird* case and the Report of the argument, this matter was not actually discussed before my Lords on that occasion. I could certainly see no reference to any charter such as I have produced showing that the words "*cum titulo*" had been used which plainly did confer a grant, and no evidence was led as to the practice of conveyancing in that century in respect of which I have led evidence demonstrating that the word "*cum*" is used to grant separate subjects. As Prof Donaldson demonstrated, that may be as important as, or more important than, the first subject. Also, words were directed to the particular terms there no doubt, but it is right to say, as I understand the matter, that it was not a matter of contention before your Lordships' House on that occasion, and there was certainly no evidence as to practice and style in that respect in the seventeenth century.

Chairman.] You are entitled to say that the *ratio decidendi* was that the charter was under the cachet and not the actual sign manual and that in a sense whatever I said there was *obiter.*

Mr *Murray.*] Indeed, my Lord, and that appears to be all I need to say; that was the only matter raised in the case, and it was a point which was not the subject of argument.

Chairman.] Another thing I would like you to deal with is that the letters patent of 1661 confer not only the Earldom of Annandale and Hartfell but the Viscountcy of Annandale and the Lordship of Johnstone. No mention has been made of the Viscountcy of Annandale and the Lordship of Johnstone as titles of dignity. Is that not rather strange, and what has happened in the circumstances to the Viscountcy of Annandale and the Lordship of Johnstone?

Mr *Murray.*] If I am right in my contentions, the position is that under the 1661 patent, which has not been resigned as far as can be established, somebody, if heir male whomsoever, could claim a right to those particular titles.

Chairman.] At all events, this Claimant will not have that right?

Mr *Murray.*] This Claimant will not have rights in respect of those titles. The

grant of a single title of earl is something which, of course, has happened before.

Lord *Scarman.*] It has happened before.

Mr *Murray.*] The Earl of Sutherland.

Lord *Scarman.*] He was also a viscount.

Mr *Murray.*] It was not necessarily the practice. The reason it might be done was that in Scotland an earldom automatically carried with it the lesser dignity of master, although "master" was never mentioned in the deed granting the title. Your Lordships are aware that until 1834 the person who was entitled to the dignity of master was normally the eldest son of the earl ; he was disentitled to vote. That was not by reason of any courtesy of the titles but by reason of the subsidiary title of master which was embraced by the earldom, so the grant of the Earldom of Sutherland was a single grant and no more. It is my contention that it is the Earldom of Annandale and Hartfell to which my claim relates.

Lord *Scarman.*] Nevertheless, it is unusual, is it not?

Mr *Murray.*] It is less usual, I am bound to say, than the grant of more than one title ; I do not think one can say more than that. Conversely, if I may put it in this way, it might be suggested at any rate that if the earlier titles had been resigned the proper construction would be to carry over everything which had been resigned, but since one is looking at this as a grant of the title of earl it was the grant of the title of earl and no subsidiary titles were involved in such grant.

Lord *Beswick.*] Can you tell me why it is that James II Marquess of Annandale is not stated to be Earl of Annandale in the genealogical table?

Mr *Murray.*] The answer is simply this, that after the first Marquess has been created (no. 4), the second Earl and first Marquess of Annandale, in writing out the table none of the lesser titles is reproduced ; only the superior grade in the peerage is reproduced. For example, William second Earl of Annandale is not given his other titles of Earl of Hartfell, Lord Johnston, and so on. The explanation is simply that nobody has taken the trouble to write out the titles in full.

Lord *Beswick.*] Why is the claim here to the Earldom of Annandale and not to the title of Marquess of Annandale?

Mr *Murray.*] The reason is that the title Marquess of Annandale created in 1701 was specific in the nature of its destination. It is a very odd destination ; if I remember rightly, it is to heirs male in possession of the lands of Annandale. That created a problem ; the destination was heirs male whomsoever in possession of the lands of Annandale. As far as my clients are concerned, as my Lords see here, the third Marquess died in 1792 without issue, so there were no heirs male.

Lord *Scarman.*] The destination was heirs male?

Mr *Murray.*] Yes, there were no heirs male of the body and the lands went one way, but the marquessate, as far as my clients are concerned, ceased at that point to be a matter in which they had an interest. I am bound to say that a claim was advanced in the nineteenth century upon a certain view as to the construction of that patent which is technically before your Lordships in limbo, but it is not a matter which we are concerned with. The reason why this case is not concerned with the marquessate is because the destination in that case is in quite different terms.

Lord *Scarman.*] I can say now that I shall require very little persuading that the King, who is the fount of all honour, can, if he so chooses, create an earl without at the same time making him a viscount or baron, but it is very unusual. I do not even know if Charles II ever did it. Certainly in the twentieth century, dealing now with the peerage of Great Britain, I do not think there have been any viscounts or earls or dukes created without all the support of those ranks represented in the peerage. The last creation of an earldom was quite recent, and certainly in that case he was created a viscount and baron.

Mr *Murray.*] I think I would be bound to accept that the recent practice has been to grant the subsidiary titles along with the earldom.

Lord *Scarman.*] What did Charles do about Duchesses when he created them? For example, in the case of the Duchess of Portsmouth, what other titles did she have in the peerage?

Mr *Murray.*] Perhaps I could endeavour to obtain instructions in the course of what I have to say.

Chairman.] Have the recent creations of viscounts also included the titles of barons?

Mr *Murray.*] No. Viscount Whitelaw is not a baron ; I am sorry, I am told I am wrong. There are cases where somebody has been created a viscount without also being created a baron. I am afraid that Viscount Whitelaw was my instantaneous reaction, but a specific example does not come to mind at the moment. The only matter which was looked at was the question of earldoms as such, and the Earldom of Sutherland is one which has been created in that way.

My Lords, I think I had concluded the remarks I wished to make on construction generally and in regard to the family circumstances which surrounded the granting the Charter of 1662. There is one more matter relative to the circumstances which I have not put before your Lordships so far and which I ought to do now. Photocopies of a document have been prepared and will be supplied to your Lordships. (*Same handed in*) This is part of the minute which records the parliamentary report of 15 June 1661 ; it is a separate sheet. It recites the sufferings of the Earl of Annandale during the Cromwellian era.

The point was that apparently a commission was appointed by the King after the restoration to try the losses and sufferings sustained by the then Earl of Annandale and Hartfell and his father for their loyalty to the King during the troubles.

I do not think I need to go through what it recites about imprisonment and destruction of property, but the point is that this commission, having made its investigation, culminated on page 735 with the calculation that the losses amounted to £288,000-odd in Scots money but I am afraid only £24,058 in English money ; that is the assessment made at the top of the second page. It goes on to say that that was the report which was subscribed at Edinburgh on 15 June 1661 and recorded in the books of Parliament "in regaird of the earle of Annandales singular losses & sufferings". The only point I make is that it can be seen after the grant of the peerage by the patent in February 1661 Parliament reported to His Majesty that, as it were, he should pay favourable regard to the Earl of Annandale's circumstances.

Lord *Templeman.*] The same point arises on this. I do not know whether you are going to deal with some of the speeches in 1834 and 1844 which are relevant to construction, but the point which arises here is that these are not losses of the Earl but losses of the Earl and his father, and one of the things mentioned in the Annandale speeches is the unlikelihood of the Monarch expressing gratitude to his father for altering the destination of the earldom granted in 1643. I know you say it is a new earldom, but it would be just as much a slap in the eye for those who hoped to take up the first earldom as for those who took up the second. Are we going to look at those speeches?

Mr *Murray.*] I shall refer to the particular passage you have in mind in the speech of Lord Lyndhurst.

Lord *Templeman.*] If I might mention one other point—and I will just go through the speeches—in the speech of Lord Brougham in 1834, page 6, second paragraph, he refers to the 1661 patent as a gift of a cumulative nature: "In the first place, it is never to be lost sight of, in construing a gift of a cumulative nature, that in the former two grants of the Lordship of Johnstone and the Earldom of Hartfell, made ten years before, there can be no question that those honours are carried, by the tenor of the grant, to heirs male general ..." He is saying one must construe all these documents which follow one from the other together. At the bottom he says, dealing with precedence: "... the Earldom which is grantcd by the charter, namely, the Earldom of Annandale, is to confer on its possessor precedence from the date of the former Earldom of Hartfell, and it is said to be somewhat strange..." The same can be said about your argument that

this is a new earldom; it is odd to give the same precedence. I merely mention those passages.

Mr *Murray*.] I will deal with those in reverse order. As far as precedence is concerned, I had hoped I had explained my position or the rationale behind it adequately. I submit that as far as the immediate holder of a grant is concerned the matter of precedence is important if, as I submit, a new earldom is to be created, because he wants to have the same precedence; he does not want to be told when he goes to Parliament that he has gone down the list of precedence. If it came to pass by reason of the difference in the destinations that there was a different Earldom of Annandale and Hartfell on the one hand from the Earldom of Hartfell (1643) on the other, for example, that issue would be resolved by Sir George Mackenzie's rule to which I have referred.

Lord *Templeman*.] But the weight of that observation was held by Lord Brougham to be far from inconsiderable.

Mr *Murray*.] But what his Lordship held was that, whilst it was a point in regard to the construction of the particular wording, if there were clear factors weighing in the other direction then they far outweighed that matter, and in my submission the point here is quite distinct, because what you have to look at in the 1662 deed are the simple words there contained. You have to look at them in the first instance and see what they properly mean. Your Lordship refers to that part of the 1661 patent which mentions his being honoured upon honour. That was the reason for saying that the 1643 patent and the 1661 patent had to be created together for the purposes of construction. There is no such reference in the 1662 Charter; in that Charter there is a reference to the sufferings of the current Earl of Hartfell.

Lord *Templeman*.] And his father.

Mr *Murray*.] Yes. The point which I trusted I had made clear yesterday, but which obviously I had not, is that as the father had no other male issue than the Earl of Hartfell it does not, with respect, make sense to say you are honouring the father by refusing to accede to the proposal that the son's children should inherit the peerage dignity and that it should go to some remote fourth cousins.

Lord *Templeman*.] The argument is that heirs general were proper methods of settling titles, and the one who got the title to the Lordship of Johnstone had deliberately chosen that form, and, as the first committee indicated, if you were honouring him you would take it away and redraft the destination.

Mr *Murray*.] I understand that argument in the context of the consideration of the proper construction of the patent of 1661.

Lord *Templeman*.] But not the one of 1662?

Mr *Murray*.] No. One is therefore looking at a different deed which possibly contained a reference to "honour upon honour" and said "honouring the father and son", whereas the 1643 deed refers not simply to honouring the father but to honouring the whole clan.

I thought the passage you had in mind was in Lord Lyndhurst's speech when he pointed out that they were dealing with a case in which the recital of the grant related to honouring the service of the ancestors.

Lord *Templeman*.] What Lord Brougham is saying—and he makes the same point at the top of page 7—is that if you have all these titles mixed up you cannot expect the destinations to remain the same, and that same argument applies with as much force to the 1662 document as to the 1661 document, for my part; I can see no relevant change in circumstances, although I know you say there was one because of the assumed departure of the infant son. Do you want to say anything about the top of page 7?

Mr *Murray*.] The only comment I wish to make to your Lordship is this, that in that case what Lord Brougham was trying to do was arrive at a proper construction of words and, if I may put it in this way, the highest which could be said for the Hope Johnstone claim was that the words were open to a construction different from the normal construction. What he was saying was

that, looking at these particular points, if you applied the normal construction of Scots law, the Hartfell peerage and the Annandale peerage ran together, but against that he pointed to the actual destination under the Annandale 1661 patent and said that it meant it was impossible to give effect to the words in the deed and he tended to say, notwithstanding this kind of construction, that you arrived at a different view. In this case it does not arise because it is quite clear in relation to the destination in the present deed that what is destined is destined expressly to "heirs male of the body whom failing heirs female of the body", so the issue of an ambiguous expression as to destination and what it normally means does not arise.

Lord *Templeman.*] I think the passage you have in mind from Lord Lyndhurst's speech in 1844, which begins on page 13, is on page 14. He goes through the creation of Lord Johnstone and the creation of the Earl of Hartfell; he goes on to deal with the patent of 1661 and says it is quite clear that the patent corresponds to the former document. You might like to deal with that passage.

Mr *Murray.*] I would like to cite the passage which says: "It is to be observed, that the recital in the patent refers to services, not of the individual grantee alone, but of certain of his predecessors, and services rendered, not to the grantor or in his reign only, but to his ancestors, which leads naturally to the conclusion that the honour was intended to be conferred, not upon him and his immediate descendants only, but upon his heirs general." That is a reference to the 1643 patent; the words as printed there might not be clear.

Chairman.] The services in relation to which the 1661 patent was granted were services during the civil war and the Protectorate?

Mr *Murray.*] That is right. I have indicated that a translation is being typed for my Lords of these letters; it is hoped it will be available later today. I have a draft before me of the translation which Mr Peskett has prepared. The 1643 patent recites: "... recalling to mind that in the year of Our Lord 1633 we were obliged to our beloved cousin James Lord Johnstoun of Lochewod and his deceased father and grandfather and his other ancestors for excellent services in times past to us and our late beloved father and grandmother of happy memory and others our most illustrious ancestors as well in our kingdom of Scotland ..." That is referring to services over a long period of time, whereas in the 1661 patent it says: "... moreover it appearing to us that our beloved father of happy memory by his letters patent under the great seal of our kingdom of Scotland in AD 1643 on account of many excellent and illustrious services performed by the deceased James earl of Hartfell etcetera and his ancestors for us ..." That seems to carry the matter through, whereas the 1662 Charter refers solely to the losses sustained by James the first Earl.

Lord *Templeman.*] Before you leave that, would you deal with the next three paragraphs of Lord Lyndhurst's speech?

Mr *Murray.*] Going back to Lord Lyndhurst, as far as heaping honour upon honour is concerned, it would apply only in respect of the 1661 patent. As far as the circumstances are concerned, that the sovereign intended to create a new Earldom of Annandale or a new Barony of Johnstone, what he is saying is that it might be a presumption which was not so indicated, but it is equally clear it is perfectly competent to do so because (he says) if the Brougham construction of 1834 is accepted there will be two Earls of Hartfell.

Lord *Templeman.*] The next two paragraphs show Lord Lyndhurst's view on the likelihood of there being an intention to create two earldoms. If your "*cum*" is as clear as you say it is it must prevail, but if it is not as clear as that we must take these considerations into account in seeing if there is any other alternative which does not involve the creation of a second earldom by three lines.

Mr *Murray.*] With respect, I must demur, because the fact is that in most creations all that is used are three lines, whatever words are used. What is being said (it is the same point Lord Brougham made in 1834 relating to precedence) is that other factors overcome that particular presumption. Here one does not have that situation; one has a situation in which there is no doubt as to the destination.

In my respectful submission, what one is required to do is give the deed of 1662 its proper meaning and attach the full meaning to every word put in that deed. The particular presumptions used in relation to the 1661 deed in that sense are helpful to the view I express because they clearly do not apply in the particular circumstances of the 1662 deed.

Lord *Templeman.*] I think the only passage in the speeches I have in mind may not now be relevant in view of the Lord Advocate's intervention yesterday. I refer to page 5 (page 21 in the top right-hand corner) where Lord Hatherley says it has been " the constant practice to make reference in the regrant to these surrenders when such a surrender has taken place."

Mr *Murray.*] That matter does not now arise in the present proceedings.

Lord *Templeman.*] That is all I have. I think you have dealt with all of the points I want to raise.

Mr *Murray.*] My Lords, I had proposed next to turn to the issue of *res judicata* which is a matter raised in this case. My submission is that even if it be the case, which does not appear to be very clear, that the question of *res judicata* can properly arise in these proceedings, or proceedings of this nature, this is not a case in which the matter would arise in any event, because it is clear from looking at the judgments delivered in the nineteenth century that they were related solely to the question of the proper construction of the patent of 1661.

Lord *Templeman.*] The point which would be made is that it is usual in litigation, if you have a claim and you have a document as a ground for supporting that claim, to put it forward ; you cannot years later have a rush of blood to the head and make the same claim based on a document which was available at the time. We are dealing with this on the basis that the 1662 document created an entirely fresh Earldom of Annandale.

Mr *Murray.*] The 1662 document created a new peerage.

Lord *Templeman.*] The first question I would like to ask on *res judicata* is a factual one. When did two earldoms diverge? We know that as far as the first earldom is concerned we are unable to point to precise facts, but you are entitled to say that the earldom was created by the 1661 document. When did the earldom created by the 1661 document and the earldom created by the 1662 document diverge?

Mr *Murray.*] In 1792, when George (no. 8) third Marquess of Annandale died without issue. At that point the heirs male of the body of James first Earl of Annandale died out. I say that subject to this, that it took some time to establish that that was so. Your Lordships have heard reference to somebody called John Johnstone of Stapleton.

Lord *Scarman.*] After the death of George unmarried and without issue the divergence arises because the 1662 creation then settles on Henrietta and her descendants?

Mr *Murray.*] Yes, and on the basis of this pedigree it is through Henrietta and her descendants that my client comes.

As far as the question of " heirs male whomsoever " is concerned, which turned out to be the construction given to the 1661 patent, it was a question of who could establish he was in fact the person who fulfilled that character. That issue is one which has not been resolved, because, as your Lordships have heard inferentially, there have been a number of claims in the course of the years in relation to that matter. Your Lordships' House has held that they have not made out their claim, and that is the position as far as the dignity is concerned.

Lord *Templeman.*] The position in 1792 was this, that if there had been a second grant it would have been No. 16 who would have claimed it ; he was born in 1741 and died in 1816 ; he would have been about 50 years old when George died.

Mr *Murray.*] That is right ; it would have been James third Earl of Hopetoun.

Lord *Templeman.*] After him it would have been——

Mr *Murray.*] — no 17, Lady Anne, his daughter.

Lord *Templeman.*] And then, 18, 20, 22, 23 and now the Claimant ?

Mr *Murray.*] Yes, my Lord.

Lord *Scarman.*] You can trace it all through from Henrietta.

Lord *Templeman.*] Was there a claim in 1825, or was the first claim in 1834?

Mr *Murray.*] As far as one can judge, immediately after the death of the Marquess in 1792 a claim was presented by people called the Johnstones of Westhall. They are referred to frequently in the subsequent minutes. They were claiming under the 1661 Charter.

The Earl of Hopetoun was advised in 1793 by Sir John Anstruther. Mr Anstruther's opinion dealt first of all with the question of the proper construction of the words of the 1661 Charter ; and it then went on to deal with the question of a grant under the Charter of 1662.

Lord *Scarman.*] Can you tell me when Lady Anne died?

Mr *Murray.*] The eldest daughter died in 1814.

Lord *Scarman.*] On my photocopy it is blurred.

Chairman. On the Lord Lyon's one it is clearly 1818.

Lord *Templeman.*] Remind me of what Sir John Anstruther said about the 1661 document.

Mr *Murray.*] The relevant part of it is to be found in the second bundle beginning at page 6. In the first part he deals with the proper construction of the words *heredibus masculis,* and that goes on for about 12 pages. Perhaps I could begin at the first complete paragraph on page 17: "I have hitherto considered it as it stands upon the Patent merely. I now come to consider it as it stands upon the Charter 1662, and the other Papers attached thereto. Two questions may be raised upon this. First, whether it may be called in aid of the Patent of 1661 in order to explain it. Secondly, whether these Deeds do amount to a conveyance of the Honour itself? These questions however are not in any sense so distinct as they seem to be, for if the Charter does not relate to the Honour but only to the Estate, then it can go but a little way to explain the Patent of Honour ; and if it relates to the Title, it is a conveyance and grant of it. It may indeed be fairly said, that it is very far from probable that at that period a person would have taken a title to heirs male general in one year, and in the next make an entail of his estate to a different series of heirs, from which it may be fairly inferred, that the maker of the entail of 1662 did understand the title to be descendible to the heirs male of the body in the first place ; and to his heirs female of the body, in the second, but if the Charter relates only to the estate the argument cannot be carried further than I have stated it." That is the argument advanced to explain the patent of 1661.

He goes on to say: "In considering whether this Charter conveys the title of Honour, it will be necessary to compare it with the Charter produced and founded upon in the case of *Cassilis* and I trust upon a fair examination of both it will be found that the Charter in the present case has many of the requisites supposed to be wanting to that in the case of *Cassilis.* In the first place, it is clear as the case states that the Signature upon which the Charter of 1662 proceeds was superscribed by the King. Charles II never was in Scotland after the Restoration, and therefore it seems a reasonable presumption that no grants were sent to London to be superscribed but those which contained something which required such superscription, and therefore if the words will bear the title of Honour it seems reasonable to presume an intention to pass it."

Chairman.] That is a fair argument ; otherwise, the cachet would have done.

Mr *Murray.*] Yes ; the only purpose of sending it to London would be to pass it. He goes on: "Now only the Signature in the case of *Cassilis* which contained words referable to the title of Honour was not superscribed by the King, and the second one which was contained no words which by a fair construction could be referred to the Title of Honour.

"Next, in the case of *Cassilis* the Instrument of Resignation excluded the

idea of the Title of Honour being resigned, for it bore to be for establishing the fee of my Estate in favour of my heirs after-mentioned. In the present case it is true the Procuratory of Resignation is lost, but it seems reasonable to suppose that it contained what was granted by the Charter."

This raises the issue whether one could grant something in a *novodamus* which had not been resigned. A very general statement was made in the *Cassilis* case that one could not do so. My Lord in the Chair has indicated it is unnecessary to give authority for that. It is the case that one can grant fresh matters in the context of a *novodamus* clause, so although at the time Sir John Anstruther was writing this he was impressed by the opinion of Lord Mansfield it was not, with respect to him, a correct statement of the law.

It goes on to say: "In the next place, in the Docquet subjoined to the Signature in the *Cassilis* case there was no word in any degree referable to the title. In this case not only is that distinctly referred to by the words with the dignity of an Earl, but particular reference is had to the nature of the dignity by allusion to the date of the Patents. It is impossible for me to apply those words to an estate or to an erection of lands into an earldom. Nobody ever heard of an estate held by Patent, and this is not one Patent but to both. These words are absolute nonsense if referred to the estate only.

"In the last place, the Charter in the *Cassilis* case contained only some obscure unintelligible words relating to precedence which were difficult to refer to the Title, but this construction was negatived by many papers in the case. In this case the words are distinct—with the Name. Style and Dignity of an Earl according to the date of the Patents—every paper is consistent with this. Nay the whole is consistent with what I think the fair construction of the Patents to be. I see no possible way of understanding either the Signature, Docquet or Charter but approving the Title resigned—nothing contradicts the idea, but the loose manner in which the *quaequidem* clause is penned—the resignation may fairly be presumed consistent with the grant, and I believe it is without example to find so many references to a Patent where it was not intended to affect the Honour. In the *Cassilis* case the resignation contradicted the Signature and Charter. The former could not convey the Honour; it was not signed by the King. The Charter of 1671 which referred to the former could mean only to pass what the former legally contained; the title could not possibly be legally contained in the Charter of 1642, and, therefore, could not be passed by that of 1671. Here everything is consistent, and the reference to the Patents not only is not consistent with a reference to the estates only but they must be struck out altogether.

"I hardly conceive there could have been much doubt, if any, in this case, if the person in whose favour the Signature passed had been a commoner, and I am at a loss to suppose why the same exact words should not operate in the same way. An objection is supposed to arise from the reference to the date of the Patents, and it is supposed that the words of the Charter refer to the Grantees, who would take under the former Patents [sic], but this is inconsistent with the limitations of the Charter, and I see no reason against presuming the Honour resigned.

"Upon all these grouds I must advise Lord Hopetoun to prefer his claim to the House of Lords. It would not be fitting his station to assume a Title to which his right were disputed; it would neither be becoming himself nor respectful to the Crown . . ."

He goes on to say that "The Earl of Hopetoun may certainly appear at the Bar as a party at all events entitled to some right under the Patent of 1661, and canvass Sir James Johnstone's proofs of pedigree, and dispute his being the heir male general. Even in that case it would be more proper for him to petition the King." As I have said, the Johnstones of Westhall had already made a claim in respect of these matters. "But if he did so appear at the Bar I do not think it would be competent for him to suggest any right inconsistent with Sir James's construction of the Patent, for if he did canvass such right he ought to petition the King."

In my respectful submission, Sir John Anstruther is clearly suggesting reasons, which I have enumerated in different

language, as to why there was a good grant. The distinction is this, that because he was referred it to the *Cassilis* case he assumed it was necessary to presume a resignation because he had adopted the dictum of Lord Mansfield that nothing could be granted which had not been resigned, which at the time may have been considered to be the laws but which Prof Halliday has shown clearly never was the law. That is a factor which leads him to approach it on the basis of a presumed resignation, but I found upon this, that somebody who is much nearer in time to the consideration of wording of this sort than we are has no hesitation at all in construing the material words as words of grant.

Lord *Templeman.*] I understand this a bit better now than when I read the case; you have made it very clear in the course of the last three days.

Mr *Murray.*] I hope I have dealt with the position of what the advice was which the third Earl of Hopetoun obtained. His petition was referred to the Committee and it foundered on the construction of the limitations of the patent of 1661. In my submission, the reason for that (I am speculating here) is that there was only a presumed resignation; none has ever been found, so the question of proof of any resignation would have been impossible in relation to the patent of 1661. His claim was not adjudged during his lifetime, and his daughter Lady Anne put forward a claim which was never adjudged. After that, John James Hope Johnstone claimed, and at various dates between 1825 and 1844 his claim was heard before the Committee. His argument before the Committee turned principally on the construction and limitation of the patent of 1661.

When I come to address my Lords on the issue of *res judicata* I shall point out that in the speeches of their Lordships it is clear that the claim then was only so related.

Lord *Templeman.*] If he was claiming the earldom it would have saved all that argument. Here was a claim put forward by someone who had been advised in very clear terms by Sir John Anstruther that he could not get it under the 1661 document but he could get it under the 1662 Charter.

Mr *Murray.*] There are at least the following reasons why it was not done. I have not read that part of Sir John Anstruther's opinion, but in fact that gave advice that the proper construction of the 1661 patent was the one contended for by the Hope Johnstones, that it should be read in the circumstances in the same way. If that construction succeeds it follows that all the dignities descend to the Hope Johnstone family.

Lord *Templeman.*] That was finally ruled out in 1844.

Mr *Murray.*] In 1879. There was an attempt to reopen the issue. The reason why the matter was pursued further after 1844 in the way it was was because the arguments of Lord Lyndhurst and Lord Brougham were based on the construction that one had to read the patent of 1643 and the patent of 1661 together. What happened was that some time in the course of the 1870s those then doing research for the Claimant discovered the resignation which we have been looking at in this case, which was the Cromwellian resignation of the Earldom of Hartfell honours and they sought to use that in order to show this was *res noviter* and the Committee should look again at the issue of the construction of the 1661 deed. In those circumstances, if one could as it were knock out the connection between the patent of 1661 and the patent of 1643 and read the patent of 1661 on its own terms the proper construction of the deed was that which had been put forward in 1834 and up to a point acceded to by Lord Brougham. In my submission, it is understandable that the family should proceed in that way. They had the opinion of the Lord Chancellor who was saying his opinion tended strongly in a particular direction, which was an opinion which was printed. I think that changed his mind 10 years later. They found evidence which suggested that the deed of 1643 had been resigned, and they tried and failed to persuade the Committee in 1879 to reopen the issue. In my respectful submission, it is not at all surprising that the family proceeded on that basis throughout the period.

Lord *Templeman.*] The last petition was brought in 1844, and nothing happened again until 1879?

Mr *Murray.*] In terms of petitions, a fresh petition was brought very shortly

thereafter. There were subsequently proceedings in the 1870s based on this document.

Lord *Templeman.*] Who would have been the claimant at that stage?

Mr *Murray.*] At that time the proceedings were brought by the same man who had made a claim in 1844.

Lord *Scarman.*] John James Hope Johnstone?

Mr *Murray.*] But he died in 1876 and was succeeded by John James Hope Johnstone who died in 1912. He was in curatory throughout his adult life. Shortly after he succeeded he was in curatory, so no proceedings were taken by his curators after the failure of the claim in 1879. I indicated to your Lordships at an earlier stage that the Petitioner could himself if required lead evidence on this, but I point out that after 1912 the estate was under burden of debt until very recently. The individual who would have had any right to claim (no. 22) lived largely in Ireland and was not interested in these matters. In my respectful submission, there is nothing in the situation since 1879 which can be said in any way to form any sort of prejudice against the claim being made now. It was not until the family could afford to reconsider the matter that the claim was further pressed.

Lord *Templeman.*] Is no. 22 the Claimant's father?

Mr *Murray.*] No. The Claimant's grandfather, who died in 1964.

Lord *Templeman.*] Was he the one who lived in Ireland?

Mr *Murray.*] Yes. I made aversions about these matters on page 54: "By this stage the estate was considerably burdened by debt, which remained [so] until the early 1970s", so the family were not in a position to prosecute the claim during that period.

Chairman.] Why was there no attempt made by the earlier claimant to found a case alternatively at least on the 1662 Charter?

Mr *Murray.*] In my submission, that is entirely logical because the alternative claim involved ceding to others the rights under the 1661 patent.

Lord *Templeman.*] Nobody got anywhere near establishing those rights.

Mr *Murray.*] The reason they did not get near to establishing those rights was because the question there was: Who was the heir male whatsoever? If one's concern was to establish what the proper construction of the 1661 deed was then to put the claim in the alternative, in my respectful submission, would have been seen as an admission in relation to the proper construction. For that reason I submit it was entirely understandable. The second reason why it is entitrely understandable is that at the early stage of Sir John Anstruther's opinion it was said that the parties were of the view that nothing could be granted by a *novodamus* clause which was not preceded by a resignation.

Lord *Templeman.*] Is there any authority of the question of delay? Here we have a claim which was the subject of advice in 1793 ; we are now in 1985, and we have had to go back into historical matters right to the year dot. Is there any authority in terms of the consideration of this case by the Committee about whether delay makes any difference—delay in full knowledge of the existence of the particular document?

Lord *Scarman.*] My noble and learned friend is getting close to something I did not understand in the report of the Lord Advocate. The Lord Advocate, in dealing with *res judicata,* refers to a general rule that *res judicata* does not bar claims of blood. That seems to me to have some relevance to delay. I do not think it rules out *res judicata* if the House has ruled on the specific claim being made before it. I think it would take a lot for this House to depart from that rule ; I am not sure it has power to depart from it. What is this general rule that *res judicata* is not to be applied to rights of blood?

Mr *Murray.*] I do not think I am in a position to assist your Lordship on that particular point ; I was taking *res judicata* generally on the narrower basis.

Lord *Scarman.*] But if there were such a general rule, in the absence of a specific founding on the 1662 Charter you would be able to say that the delay over the centuries was really something not to be considered.

Mr *Murray*.] But in the course of what I have been saying I have not yet mentioned the fact that the 1662 Charter was sought to be brought forward in the 1879 proceedings for the purpose of emphasising the appropriate construction to be put upon the 1661 patent.

Perhaps it might be appropriate to refer to what Riddell on Scots peerages has to say. I refer to Vol. 1, at page 369. The full title of the book is "An Inquiry into the Law and Practice in Scottish Peerages, &c". It says: "It has been seen from a statement in the Oxenford case, that a non-claim of a family, from 1705 to 1733, was deemed an unfavourable incident, by Chancellor Talbot, with whom (however it be viewed) it considerably weighed. But the objection, as must be evident, applied, *a fortiori,* to the Colville instance: for not only was the non-claim there, probably at least for eighty years, but under adverse and inexplicable, if not more injurious circumstances. Yet this striking fact gave rise to no scruple or objection, but was also overlooked."

Having referred to another case, he says at page 370: "The protracted neglect of a family to claim a dignity must always originate inquiry, especially when suspicious or inexplicable; but abstractly, and in other circumstances, it cannot materially weigh, when withal there is no adverse assumption or recognition."

In my respectful submission, in this case there has not been neglect in respect of this family. There has been a view as to what the proper tactics might be; there has been, in the words of the learned author, "no adverse assumption or recognition". He is talk- there perhaps about a case where some party has started to use the peerage dignity and after a long period of time some branch of the family advances a claim which previously has not been made, but that is not the position in the present case in any way. The position here, as I have tried to indicate, goes further than I have suggested, because further advice was obtained from Mr Riddell, the author of this textbook to which I have just made reference, in 1827. At page 25 of the bundle there is a transcript of a letter written by him to the Solicitor General and dated May 19, 1827. The Solicitor General to whom it was addressed was acting on behalf of the Hope Johnstone family at the time. (I suspect his name was Hope). He refers in the first sentence to having "had the pleasure of meeting you" and says, "I would fain trouble you with the following remarks, as with all submission, I cannot help thinking there may be some misconception in point of fact.

"The conveyance I had in view was a Royal Charter dated *at Whitehall* 3rd of April 1662 (hence *subsequent* to the original Patent of the Earldom at Whitehall, 13th February 1661) which destines the Annandale estate—'cum *titulo et dignitate comitis* secundum datas Diplomatum—Jacobo Cimiti de Annandale et Hartfell et quondam ejus patri desuper concess'—, in the first instance, not simply to 'heirs male', as in the other, but 'haredibus masculis legitime *de corpore procreat*'. Etc.—hence as far as it goes, leaving no doubt as to the import of the first substitution and completely excluding heirs male collateral. This being the latest as far as I can discover, should consequently, *if effectual,* be the regulating limitation of the honours of Annandale, and with all deference I cannot exactly see anything that impeach its efficacy. No doubt the signature may be wanting . . .", and he goes on to deal with how to overcome the problem of the absence of a signature, or how it had been dealt with in another case.

If your Lordships would go to page 2 and turn to the middle of the page, where there is a word which cannot be translated, but we think it is "That", he says: "[That] *this* Patent of Annandale passed the seals and hence was fully perfected, I conceive there can be no doubts, as it is to be found entered at full length in the Great Seal Record at the natural time. Neither am I aware of any other exception that can be urged to its validity, or be prejudicial to, or effect it in so far at least as regards the honours. It proceeded upon the resignation of the Disponee (is not this the case?), and the subsequent limitations, after the first are just as favourable as the corresponding ones in the previous patents."

If that passage refers, as I think it does, to the Charter of 1662, he again is making the assumption that it proceeded upon a resignation, and that we

know was not correct. Then he says: "Excuse me for my presumption, but really unless there be some very singular speciality of which I am unaware—it seems difficult to avoid the conclusion, and even under other circumstances, the charter 1662 may be adminicular proof of the interpretation of the Grant in 1661."

That was the basis on which it was sought to be used at that stage.

There is a further letter immediately following that one, again transcribed at pages 31 and 32. That is a letter from Mr William Fraser to Mr James Hope in 1844. On page 32 he says this: "Mr Riddell is clearly of opinion that the Signature of 1662 grants the Dignity of an Earl—see the Docquet—and that if Mr Hope Johnstone fails under the Patent 1661, he will succeed under the Charter 1662 to the Dignity of Earl of Annandale & Hartfell."

The letter was dated May 7 1884 and the judgment of the House was given in the following month and that ruled against the construction of the patent of 1661, but, as I have already indicated, what happened was that in the course of the further researches which were made the deed of resignation of 1657 was discovered, and it was considered by those then advising the family that the appropriate tack was to attempt to persuade the House to reconsider their decision in 1844.

Lord *Scarman.*] On the question of *res judicata,* here was a point which was open and not taken. Why should it now be reopened, unless there is a special rule about *res judicata* in relation to claims of blood? It seems to me this is your difficulty.

Mr *Murray.*] But this claim is not one which has ever been made or adjudicated upon.

Lord *Scarman.*] But it could have been.

Mr *Murray.*] If a party has a separate basis of claim in respect of a different thing, because that is what we are talking about——

Lord *Brightman.*] It would not be surprising to find a more relaxed attitude to *res judicata* in these sorts of cases, because in ordinary civil cases the *res judicata* rule is there to protect a party who is in possession of an earlier decision, but here you are not seeking to displace anybody.

Mr *Murray.*] I am obliged; there is no question of displacement of anybody. This is a claim which could have been presented after 1792, but it respectfully appears to me that it would certainly have been regarded unfavourably because of the view expressed in the *Cassilis* case in relation to *novodamus.*

Lord *Scarman.*] For myself, I would not expect the full rigour of *res judicata* in civil litigation to be applied to these sorts of proceedings; I am absolutely with you on that, but I am still very surprised at the course of events over the centuries. Obviously, a more relaxed view of *res judicata* must be appropriate to claims of this sort. I would like you to help me on one matter, and it may be I am asking you to do something which I should ask the Lord Advocate to do, but it is convenient to deal with it at this stage. In the Lord Advocate's report on *res judicata* at page 29 of the printed bundle there is a reference, which no doubt is a matter of thorough research, to the statement of the Earl of Redesdale on 30 May 1879 when presumably proceedings were before the House. I would very much like to see the context in which that statement was made.

Lord *Templeman.*] That was in 1879; that was when they were thinking they could still prove that your client's predecessors could claim the title under the 1661 patent on the basis of heirs male general.

Chairman.] That was impossible; it was connected to a female line.

Mr *Murray.*] What my Lord Templeman has in mind is the proof that heirs male were extinct.

Lord *Scarman.*] I want to see the context of the statement of the Earl of Redesdale "that the resolution of the Committee of that date would not bar 'any further proceedings which any claimant may be disposed to take by any subsequent steps'". I want to see how general that is, or whether it is weakened by its context.

Mr *Murray*.] If I might summarise the way it arises, the resolution having been made, the Committee were not disposed to reopen the determination of 1844. The Lord Advocate appeared for the claimant at that time.

Lord *Templeman*.] On page 9 they make it quite clear why they are leaving it open.

Mr *Murray*.] It is at the end of the speeches.

Lord *Brightman*.] Was the Chairman Lord Redesdale?

Mr *Murray*.] Yes, he was.

Lord *Templeman*.] You have to read page 8.

Mr *Murray*.] Pages 8 and 9 indicate what he was looking at. All the other claims were left. If I can refer to what Mr Fleming, counsel for the Johnstones of Westhall, said: "Your Lordships will not, of course, decide anything further than this, that, upon the case before your Lordships, Mr Hope Johnstone has not made out his Claim to the dignities claimed by him. That will not interfere with any other Claim which he may make. I hope your Lordships will not add anything else to your Resolution." Therefore, the concession made by counsel for the other parties was that the decision of their Lordships, that the claimant had not made out his claim in that case, did not bar or interfere with any other claim he might make.

Lord *Templeman*.] You have not read what Lord Blackburn said at the bottom of page 8, going over into page 9. The Lord Advocate says there are two other claims, one not affected by the construction of the patent, and the other is that "'The Petitioner also submits that he is entitled to the dignities of Earl of Annandale [and so on] on the separate ground that all the Heirs male lineal and collateral of the original Patentees in these respective dignities have now failed and are extinct.'"

Mr *Murray*.] There were two other claims in that particular petition with which the Lord Advocate was concerned. The point Mr Fleming was making was that it was only the third point which had been determined against him and it would not interfere with any other claim made; and the Lord Advocate said that he had already put forward claims on different grounds and he simply did not want the claims which were already in the petition upon which he had not been heard to be disposed of. What Lord Blackburn said was that "if you succeed in proving that the Heirs male general of the first Earl of Hartfell are extinguished, then you will come in?"

Lord *Scarman*.] With respect, I think the intervention of the Lord Advocate at the bottom of page 9 and top of page 10 throws tremendous light on *res judicata* and what it means in claims of this sort. That is his comment after Mr Fleming's request—"I cannot conceive anything more inconvenient than departing from the ordinary and well-established forms of the House in Peerage Cases. *Lord Advocate*.——Except refusing a Claim without hearing the Case in support of it." It goes on in a similar way; it is similar to Lord Redesdale's comment which the Lord Advocate has quoted in his report in this case, that *res judicata* cannot extend in cases of this sort beyond a claim for which a case has already been made out before their Lordships' House and has been dismissed, and you can say that is not your position at all.

Mr *Murray*.] Indeed, my Lord.

Chairman.] One would have thought that if there was any ground for *res judicata,* if it was available in principle, it would have been the *Oxfuird* case.

Mr *Murray*.] Indeed, my Lord.

Chairman.] Basically, what happened was that Lord Chancellor Talbot decided that the claimant had not made out his case because the Lord Chancellor did not know anything about Scots law and there was nobody else apparently who did.

Lord *Scarman*.] Thank God those who are blind have a well-sighted leader in this case!

Mr *Murray*.] That was all I intended to say in relation to the history of the conduct of this matter and in relation to *res judicata*.

Simply in order to complete the matter, may I point out the speech of Lord

Chancellor Lyndhurst on 11 June 1844, in particualr the middle of the first paragraph appearing on page 11: "The only question therefore for your Lordships' consideration, is, whether there are any such circumstances in the case now under consideration, circumstances of such a nature as to lead you, with certainty, to the conclusion that the terms 'heirs male', which are here used, were meant to be used in the sense of 'heirs male of the body' . . ." That was the sole issue which was there being considered.

If you look at the judgment in 1879, it is clear again from the Lord Chancellor's second paragraph that "the only Case which at this moment your Lordships have to deal with, is the Case of Mr Hope Johnstone, in support of his Claim under what I may call the second limitation in the Patent." In my respectful submission, it is clear from the declaratory statement, if it was not clear otherwise, that there can be no question of the present matter having been determined by their Lordships.

Accordingly, my Lords, I would formally renew the motion I made at the outset, and I apologise for not using the proper procedure; I invited your Lordships to grant the prayer of the Petition, but it is a Petition of right. I formally ask your Lordships to make a report in terms favourable to the Petitioner.

Chairman.] You have not dealt at all with the question of destination in relation to heirs female which you mention in your case.

Mr *Murray.*] That was a matter on which I wished to know whether your Lordships required assistance, because, in my respectful submission the proof of heirship is a matter which has already been determined in this particular case.

Chairman.] The pedigree is determined; there is no doubt about that, but there is the question of construction of the destination and whether a succession is capable of proceeding to one heir female of the body and then to her heirs male of the body and, when they become extinct, to their heirs. That is a question of construction, is it not?

Mr *Murray.*] Yes, but in my respectful submission that matter has already been determined, because in the case of *Johnstone against Johnstone,* reported in 1839 2 Dunlop page 73, a question was raised in relation to this estate and the title to them under the Charter. Your Lordships will see from the rubric that it was between John Henry Goodinge Johnstone, pursuer, and John James Hope Johnstone, who was the gentleman claiming in 1825, which claim was determined in 1844 and again in 1879. The claim was directed against John James Hope Johnstone and the Earl of Hopetoun's trustees: "In a reduction of the titles of an estate, at the instance of a party setting himself forth as the heir entitled to succeed to the estate under a certain destination, where it appeared from the showing of the summons that the defender was the party entitled, under the rule of the Bargany case, to the character in question,—preliminary defence, to the effect that the defender, and not the pursuer, was the true heir, sustained as a title to exclude." The issue being raised was whether John James Hope Johnstone, from whom my client takes in the direct male line, was the person entitled to succeed to the estates. The title is set out on page 74. The pursuer claimed to be descended through a female of John Johnstone of Stapleton. The veracity of that claim was, of course, hotly disputed.

Chairman.] I think that is accepted by Mr Peskett.

Mr *Murray.*] Yes, but the argument in that case was, even assuming that what he claimed was true and he was the legitimate descendant of John Johnstone of Stapleton, was the proper construction of that deed such that on the death of Lady Anne it went to another male line or descended to her heirs male? There is no report of a decision in the Inner House because they were unanimously of opinion that the interlocutor should be adhered to. The Lord Ordinary took the view that according to the rule laid down in the *Bargany* case, where a similar dispute involving males and not females occurred, the descent was through Lady Anne and her male descendants.

The passage to which I refer is on page 76 where in the judgement of the Lord Ordinary, Lord Cunningham, one finds this: "From the pedigree of the Annandale family, founded on by the pursuer, it appears that the pursuer

allows himself to be a descendant of a grand-daughter of a *younger* son of James Earl of Annandale and Hartfell, while the defender Mr Hope Johnstone is an admitted descendant and the heir-of-line of the only daughter of the Earl's *eldest* son. In these circumstances it is plain, according to the law laid down in the *Bargany* case, and universally acted on ever since, that the defender, and not the pursuer, is the heir-female of the body of his ancestor James Earl of Annandale and Hartfell." In light of that statement, I do not know whether your Lordships wish me to go on what is set out thereafter. That was the view of the Lord Ordinary, and it was unanimously adhered to.

Chairman.] That is authority in your favour in terms of this destination.

Mr *Murray.*] In my respectful submission, it is not necessary to go into the issue because that is a matter which perhaps is *res judicata.*

Chairman.] As far as what you found on that authority is concerned, we do not need to go any further.

Mr *Murray.*] In my respectful submission, the other heads of claim relating specifically to pedigree are covered by the views expressed by your Lordships at the outset, and unless any change has occurred in that respect I would simply renew the motion I made.

Chairman.] Thank you, Mr Murray. Has the Lord Advocate anything to add?

The Lord Advocate.] My Lords, I hope I will be able to be relatively brief. There are really two questions which I suggest your Lordships might require to be satisfied about on the evidence, the second being the question of pedigree on which I do not propose to address your Lordships.

The primary question is whether the 1662 Charter created by conveyance a peerage dignity. I would remind your Lordships (it is fairly clear your Lordships accept it) that before considering the 1662 Charter on the authority of the *Oxfuird* case your Lordships have to be satisfied that there was a Signature properly adhibited by the monarch, because that is the authority for the creation of the peerage dignity. As I apprehend the law—in particular, the *Cassilis* and *Oxfuird* cases give some indication of this—unless there is such authority granted by the monarch the Charter itself cannot be sufficient to carry a peerage dignity.

There has been evidence as to the question of the Signature and the Docquet, and my Lords will be aware of that; I do no more than bring my Lords' attention to that issue.

The next question is the issue of the Charter itself and whether as a matter of conveyancing practice it was apt to carry the dignity.

It is clear that your Lordships have read the speeches delivered on the previous claims, but in view of what has been said I think it important to bear in mind the terms of the 1661 patent. Unfortunately, we do not as yet have a translation. (*There followed a short pause).* In fact we now have a translation. (*Document handed in*) The 1661 patent is on page 3.

Since one of my Lords raised the matter, I think it is important to see what the grant appears to have been. I read from line 119 onwards: "Indeed also we have given and granted and by the tenor of the presents we give and grant to the said earl and his heirs male and other heirs of tailzie aforesaid for ever the title honour order and degree of dignity of earl and lord of parliament so that the position there may be enjoyed as much as earl of Annandaill according to the letters patent formerly granted to the deceased earl of Hartfell in A.D. 1643 . . ." It goes on: " . . . and by the tenor of the presents we invest and ennoble the said James earl of Hartfell and his heirs male and other heirs of tailzie aforesaid so that for all future time they may be called earls of Annandaill" and so on. My Lords, I observe I am bound to say that I understand the Latin to read "the name Earl of Annandaill and Hartfell"; that would appear to be the name by which they are to be called, although the grant appears to be the Earldom of Annandale. My Lords, as I understood certain of the speeches in earlier claims, that appears to have been the understanding of certain of their Lordships. I refer to Vol. 2, the very last flag in that bundle

dealing with the judgment in the previous proceedings; it is page 5 of Lord Brougham's speech. Half-way down the page he deals with the pedigree, and says: "I have no hesitation whatever in giving my opinion to your Lordships that the Claimant has proved his pedigree exactly as he has laid out, and as his contention requires it to be made out. Upon this there is no doubt whatever, he has connected himself with the patentee as the great grandson of Henrietta, who was the eldest daughter of William, Earl of Annandale the first Marquis, the son of the patentee, created Earl of Annandale in 1661 . . ."

If your Lordships would turn to the bottom of the next page, which is a passage to which my Lord Templeman referred, some five lines from the bottom we see: "Such seems to me the fourth topic, and it is this: the Earldom which is granted by the charter, namely, the Earldom of Annandale, is to confer on its possessor precedence from the date of the former Earldom of Hartfell . . ."

Chairman.] I do not think Lord Brougham was directing his mind to that point but to the point of what His Majesty did in the 1661 Charter, which was to make the said James Earl of Hartfell and a series of heirs Earls of Annandale and Hartfell.

The *Lord Advocate.*] Yes. Perhaps to simplify the matter, I would like to refer to the speech of the Lord Chancellor in 1879 (page 19 of the bundle). At the very bottom of the page his Lordship asks: "Well, but how does that bear upon the Patent of 1661? I pointed out that the Patent of 1661 not merely dealt with the old honours, but dealt especially with, and had its origin in a desire to confer, an entirely new and apparently larger and more important honour—the title of Annandale.

I merely mention this because I think my Lords were concerned as what the purpose of the patent appeared to be. He then goes on to deal with other matters.

Chairman.] That passage seems to indicate that the Lord Chancellor contemplates the Earldom of Hartfell still continues under the previous grant of 1643.

The Lord Advocate.] Yes; he makes it absolutely clear at the very top of the same page in a paragraph which begins at the bottom of the previous one: "My Lords, before I refer to what is said to be the new matter imported, I would remind your Lordships also of what the tenor of these Letters Patent is, if we continue our observations to them alone. I will not go through them at length, for they have been very recently read to your Lordships, but I will remind your Lordships that the frame of the Patent of 1661 is this. It refers to the Patent of about twenty years before, in which the Johnstone of that day had been created Earl of Hartfell, and Lord Johnstone of Moffatdale and Evandale. It also mentions his still earlier title of Lord Johnstone of Lochwood, but it refers specifically to the Paent next immediately preceding, that is, the Patent of 1643. It speaks of that Patent as a Patent in existence, not as a Patent which in any way had come to an end."

He goes on to say: "Therefore, my Lords, there is nothing whatever in the Patent of 1661 which would lead your Lordships to suppose that it was a document in any way incomplete; in any way requiring you to travel out of it, and to look at some other proceedings; or in any way suggesting that there had been any surrender of the earlier titles the nature of which surrender should be looked at, or should be brought into consideration, for the purpose of determining the meaning of the new grant which was now made."

I am just bringing that to your Lordship's attention because it seems to my mind to be important in your Lordships' consideration of the wording of the Charter of 1662, because, as I understand the argument of my learned friend, the earldom which is created by the Charter of 1662 is the Earldom of Annandale and Hartfell, whereas your Lordships' House appears to have decided in 1879 that prior to that there were two or three patents all of which stood on their own feet as it were: one creating the Earldom of Annandale in 1661; another creating the Earldom of Hartfell in 1643; and the other creating the Lordship of Johnstone in 1643. That seems to me to be a circumstance which your Lordships may wish to

have in mind in considering the argument.

Lord *Scarman.*] Peerages abound in this family, but nobody can show he or she is entitled to any of them.

The Lord Advocate.] There has certainly been a constant effort over the last two centuries to establish some resolution of this, based on one of two documents.

Lord *Templeman.*] I suppose that if the 1661 document had been carried on the 1662 document would have referred to the Earl of Annandale and the Earl of Hartfell.

The Lord Advocate.] No, because if I read the translation of the 1661 patent aright it creates him Earl of Annandale but says that he shall henceforth be known as the Earl of Annandale and Hartfell, and, as appears at the end of the Latin text on page 9 of the minutes in the additional bundle, there is a reference to the endorsement at Edinburgh on 8 March 1661: " . . . the Lord Commissioner did deliver the same to the Duke of Hamilton, who, in Name of the Earl of Annandale and Hartfell, received it upon his Knees." It would appear that the patent names him as the Earl of Annandale and Hartfell, and that may be a circumstance which your Lordship consider important in terms of what " cum " means in the 1662 Charter. Is this the erection of a new peerage dignity, or is it to be read in another sense?

Both witnesses, Prof Donaldson and Prof Halliday, explained that "*cum*" can in certain circumstances be descriptive.

Lord *Scarman.*] Whilst on the 1661 patent, looking at your translation . . . .

The Lord Advocate.] It is not mine, my Lord.

Lord *Scarman.*] Lines 122-123 say " so that the position there may be enjoyed as much as earl of Annandaill according to the letters patent formerly granted to the deceased earl of Hartfell in A.D. 1643 ", and so on. What is meant by " as much as "? I do not quite follow what that is saying. The Latin word is "*tanquam*". I remember it well. I wondered if it should be translated as " as " or as " as much as "; it can mean both.

The Lord Advocate.] I am bound to say that until I received the translation I also had translated it as " as ".

Lord *Scarman.*] With respect, I think the translator has done something which years ago would have got a schoolboy into trouble. The verb " to be " in the active has been turned into the passive, but the sense is the same; it reads " so that the position there may be enjoyed ", but in Latin it is " so he may enjoy *tanquam* the Earl of Annandaill ". I would have thought it meant " as ".

The Lord Advocate.] Yes; " as " is exactly on target and " as much as " is wrong.

Chairman.] We have not had the opportunity of looking at this document in English before.

Lord *Scarman.*] One always had an opportunity to do this in one's Latin preparation to avoid the dire consequences of errors, but one does not do so in the Moses Room.

The Lord Advocate.] All I say is that that translation would appear to fit in with what your Lordships have said in speeches on earlier occasions dealing with other claims.

My Lords have already referred to the general rule of construction relating to Scots conveyancing. There is authority in Scotland and indeed in your Lordships' House for the proposition that in interpreting a statute one remains within the four corners of the deed with limited exceptions. I simply give your Lordships the reference to the case of *Anderson against Lambie* 1954 Session Cases (HL), page 43. I refer to the speech of Lord Keith in that case at page 63 when he deals with the law on the construction of conveyances.

However, I would accept, as was said by Lord Hatherley in his speech on 30 May 1879, that if your Lordships are required to interpret language where it is obscure or doubtful then it would appear to be proper to look to other examples of what he called " documents of the same epoch ". There has been evidence about it, and I simply suggest that if that is a proper qualification, if

your Lordships can go outside the document in seeking a construction, it is not appropriate to go simply to the general background circumstances for the purposes of interpretation, unless it be (this is an important qualification) as to the meaning of the reference to "the Earl of Annandale and Hartfell". All I simply say is that my Lords might bear in mind what is said in the patent of 1661 in relation to the construction of that document.

There has been argument concerning the words in the 1662 Charter "Name, Style and Dignity". It is only fair to say that that is slightly different from the reference in the 1661 Charter; the Latin is "*ut vocentur*"—that they may be called. I would therefore say that however interesting the historical background to this claim may be it is of no assistance to your Lordships as to the interpretation of the Charter of 1662.

Perhaps I might say there is really no evidence that the monarch was aware of the particular family circumstances, such as the death of the child; even if it had occurred it would have been antecedent to the grant of the Signature or superscription of the Signature and the grant of the 1662 Charter.

Lord *Templeman.*] I understand that, but I am not quite sure what you are saying as to the proper method of construing the 1662 document. Do we look at it alone, or look at the original grant of the earldom of Hartfell in 1643 and the 1661 patent? Do we merely take the 1662 document and blind ourselves to everything else?

The Lord Advocate.] Obviously, there are two phrases which my Lords would be very concerned about. The first is the appearance of the word "*cum*". Your Lordships may feel it is by no means certain. Your Lordships are entitled to look outside for assistance from other documents. The other phrase which is important is the reference to the Earldom of Annandale and Hartfell according to precedence. I would simply say that one might look at how one construes that in the patent of 1661, bearing in mind that the patent of 1661 appears to be the grant of the Earldom of Annandale and thereafter goes on to say that henceforth he shall be known as the Earl of Annandale and Hartfell; and the Earl of Annandale is granted the same precedence as the Earl of Hartfell. Therefore, the 1661 patent appears to have brought the two together as far as precedence is concerned. That may assist your Lordships in construing the reference in the 1662 deed to precedence. If at the end of the day your Lordships remain in doubt and cannot reach any conclusion, I would suggest that the effect must be, as with previous claims, *non probatum.* But in my submission your Lordships must be absolutely clear as to the meaning of the 1662 Charter before your Lordships are entitled to report in the sense my learned friend suggested.

Chairman.] It is necessary to form a view as to the effect of the 1662 Charter. I do not think we can leave the matter on the basis that we cannot make up our minds.

Lord *Scarman.*] Lord Brougham's speech in 1834 is a splendid early nineteenth century dissertation on the importance of the purposive construction of statutory or royal language. When Lord Lyndhurst comes to deliver a definitive opinion 10 years later he also says that words can be construed flexibly. That really means, as we would say in the twentieth century, we have to consider the clear intention to be derived from reading the statute or royal will. That does mean, does it not, that in the process of reaching a clear conclusion—I agree it is that or nothing—we are entitled to look at the thing and say to ourselves: What was the intention of the monarch?

The *Lord Advocate.*] I would not demur to that view. I had hoped I had made it clear in relation to what I said about the Signature and the Docquet, because in effect that is a clear expression, or is intended to be a clear expression, of the monarch's will.

Lord *Scarman.*] In looking for the intention of the monarch I accept your point which is really unanswerable that tremendous attention must be paid to the Signature of the document.

The *Lord Advocate.*] My Lords, there is really nothing else I would say upon the question of construction, other than simply refer to one matter which the Lord Chairman referred to yesterday, that is, the effect of the 1877 Act. As I understood Prof. Halliday's evidence, it

was to the effect that the part of the *novodamus* clause introduced by "*Et similiter*" was the making of a new grant as opposed to a grant anew, and therefore the question of whether the 1877 Act is of relevance here does not, with respect, appear to arise. I say that because I wish to reserve the Crown's position as to the effect of the 1877 Act, in particular the definition of the word "lands" in reference to the terms of section 3 of the Conveyancing (Scotland) Act 1874. That contains a definition of "lands" which arguably would not include an incorporial right such as a personal peerage dignity. In some cases perhaps the matter does not arise, but I would like to draw it to your Lordship's attention.

The last matter I ought to deal with is the question my Lord Lord Scarman raised on *res judicata,* in particular what was said in my report. I am talking about rights of blood. This is based upon a statement in Stair's Institutions, Book 2, Title 12, Chapter 15, where Lord Stair says this: "The right of blood prescribes not. No person may enter heir to his predecessor who died hundreds of years before, yet if any other were entered, that is to say, if somebody himself has taken his heir, he"—that is, the person who makes the claim—"cannot after 40 years verify or reduce the same." The reason I put it in as a matter of generality is that *res judicata* would not otherwise arise as far as right blood is concerned. That appears to have been the view as far as Lord Brougham was concerned on the question of heirs general. I do no more than refer my Lords to the second page of his speech in 1834 where towards the bottom he says: ". . . thus those honours can hardly, by even any remote possibility, ever be extinguished; consequently at all times, and at any moment (as there is no limitation of claims to honours) a person may start up, prove his descent from a common male ancestor, connect himself with that common male ancestor by males, connect the patentee also with the same male ancestor by males only, and thus may establish an unquestionable claim under the designation of heir male, or heir male general, or heir male whatsover."

I take the point my Lord Lord Scarman made, that if the matter has become justiciable and decided upon, for instance as in the case of the claim of the Westhall branch, *res judicata* may be raised against a subsequent claim.

Chairman.] It might not be technically so, but I agree that if this Committee had decided a particular point it would not go back on that decision.

The *Lord Advocate.*] I would accept that, and I do not think I can go further.

Lord *Brightman.*] There is one point I have not fully understood. I would like to explore the argument against the Petitioner in one respect. The "*cum*" clause has been described as being descriptive or dispositive. I want to see what is meant by "descriptive". It is common ground that under the 1662 Charter the territorial earldom is destined to heirs male of the body, etc.

The *Lord Advocate.*] That is so.

Lord *Brightman.*] If one wanted to argue that the "*cum*" was descriptive, would one's argument be that that clause really means that the territorial earldom has to go along and be enjoyed together with the 1661 peerage title? Is that what is meant?

The *Lord Advocate.*] I think that is the contrary argument.

Lord *Brightman.*] That is what is meant by "the descriptive construc-

The *Lord Advocate.*] Yes.

Lord *Brightman.*] As the 1661 peerage title, as I understand it, is to heirs male general and the territorial earldom erected in 1662 is effectively to heirs of the body, is the descriptive construction a tenable one, because it could not be enjoyed?

The *Lord Advocate.*] Of course, I am here to do no more than assist your Lordships.

Lord *Brightman.*] I am asking you to take on the role of *advocatus diaboli.*

The *Lord Advocate.*] My Lord puts it as being untenable. I would have preferred this argument, that if it is describing the present situation at the time it is erecting the lands which have been the subject of the resignation into a territorial earldom it will go along with that

which the King has previously granted by the Charter or patent of 1661.

Lord *Brightman.*] It would really be enjoyed with the 1661 peerage until they diverged.

The *Lord Advocate.*] That is so.

Lord *Scarman.*] It would be a very strange thing to say, "We are granting a new peerage to go along with the territorial earldom, but we contemplate divergence in the future." Surely, the question which must be resolved is: What was the intention of the King by his Signature? Was it his intention that the two should be enjoyed together? If so, these words cannot be descriptive. Or was it his intention, irrespective of anything to do with the territorial earldom, to create or recognise the existence of the 1661 Charter?

The *Lord Advocate.*] I take the point that my Lord Lord Brightman has put to me. The reference to the Earl of Annandale and Hartfell as a name does appear in the 1661 patent, and the reference also appears there to the precedence being that of the Earldom of Hartfell under the 1643 patent. Therefore, these words could be apt to describe the situation of the second Earl of Annandale and Hartfell in 1662, that is to say, he was called the Earl of Annandale and Hartfell and he had precedence accorded by the 1661 patent.

Lord *Brightman.*] Would the precedence have been referred to in a formal descriptive expression?

The Lord Advocate.] I can see there is a problem there if one is arguing for the descriptive construction, just as one accepts it might be difficult to explain why the reference to "Name, Style and Dignity" is repeated in the 1662 Chapter in reference to the Earl of Annandale and Hartfell, whereas in the 1661 patent there is a reference to the creation of the Earldom of Hartfell. I am trying to be as fair as I can to both arguments.

Lord *Brightman.*] I am trying to understand the implications of the descriptive construction.

The Lord Advocate.] As my Lord Scarman said earlier, I accept that if it was purely descriptive, why have a reference to precedence, and why have a reference to "Name, Style and Dignity"? I accept the evidence about "*cum*". Unless there is anything further on which I can assist my Lords, I would simply complete my address.

Chairman.] Thank you, Lord Advocate. Mr Murray, I do not think there is anything you need to comment on.

Mr *Murray.*] No. my Lord. Perhaps I should formally move the adoption of the translation which has just been handed to my Lords.

Chairman.] We accept the translation.

Mr. *Murray.*] Formally I should move the granting of the preliminary Petitions.

Chairman.] Your preliminary Petition to dispense with formal proof of heirship is in order; we grant it. As regards the Petition to dispense with the proof and translation of Latin documents, I think all that needs to be proved has been proved. We will not make any formal order in relation to that.

We shall adjourn the proceedings now and notify the parties as soon as possible of a future date upon which we will meet again to announce what our recommendation to the House will be.

Counsel and Parties were ordered to withdraw.

Thursday the 23rd of July 1985

Lords present:

Aberdare, L.
Brightman, L.
Caccia, L.
Campbell of Alloway, L.
Keith of Kinkel, L.
Scarman, L.
Templeman, L.

The Lord Keith of Kinkel in the Chair

Counsel and Parties were ordered to be called in.

Chairman.] The Report of the Committee for Privileges, which will be laid before the House of Lords, consists of five Resolutions upon which the Committee is unanimously agreed and is accompanied by a written Opinion which I have prepared and in which the other Members of the Committee concur. That Opinion has been reproduced and will be available for distribution after this meeting.

I shall now read the Resolutions of the Committee: "(1) That by Signature and Charter under the Great Seal of Scotland both dated 23 April 1662 His Majesty King Charles the Second created in favour of James, First Earl of Annandale and Second Earl of Hartfell a title and dignity of Earl of Annandale and Hartfell separate and distinct from the titles and dignities of Earl of Hartfell and Earl of Annandale created respectively by Letters Patent dated 18 March 1643 and Letters Patent dated 13 February 1661;

"(2) That under the said Signature and Charter the limitation of the said title and dignity was to the heirs male of the body of James, First Earl of Annandale and Hartfell, whom failing to the heirs female without division of his body and heirs male of the body of the said eldest heir female, whom failing to the nearest heirs and assignees whomsoever of the said James, First Earl of Annandale and Hartfell;

"(3) That the heirs male of the body of James, First Earl of Annandale and Hartfell are extinct;

"(4) That the Petitioner is the heir male of the body of Lady Anne Hope Johnstone, who was the eldest heir female of the body of James, First Earl of Annandale and Hartfell and;

"(5) That the Petitioner Patrick Andrew Wentworth Hope Johnstone is now entitled of right to the title and dignity of Earl of Annandale and Hartfell in the peerage of Scotland created by the said Signature and Charter."

The Committee proposes to direct that the proceedings be printed, but, Sir Crispin, you may have noticed there are quite a number of errors. Would you be prepared to correct some of the more obvious ones?

Sir *Crispin H Agnew of Lochnaw.*] I have been through the Minutes and have made what appear to me to be appropriate corrections to them, and various portions of the expert evidence have been sent to the relevant witnesses for revision, so the necessary revision has been done, and it would be appropriate if the Minutes were printed.

Chairman.] If those instructing you can communicate the suggested alterations to the Principal Clerk they will be sent to the Stationery Office to help them get the whole thing reasonably accurate.

Sir *Crispin H Agnew of Lochnaw.*] I am obliged, my Lords.

I wonder whether I could, with respect, suggest one minor amendment with regard to the Petitioner's surname. He has been officially recognised as Johnstone of Annandale and of that Ilk; that is his proper and lawful surname in Scotland. I respectfully suggest that it would perhaps be appropriate that he be so described in your Lordships' Resolutions.

(*Their Lordships conferred*)

Chairman.] We shall leave the terms of the Resolutions as they are.

Sir *Crispin H Agnew of Lochnaw.*] I do not know if it is necessary for me to say so, but in the Petition the Petitioner does refer specifically to reserving his potential claim to any peerage under the 1661 Letters Patent, and if he does have any such claim he would still wish to note his position as reserved on that.

Chairman.] I do not think it is necessary because the Resolutions make clear we are dealing with a title and dignity separate from that created by the 1661 Letters Patent. We will just let the position on these Letters Patent remain as it is.

Sir *Crispin H Agnew of Lochnaw.*] I am obliged.

Chairman.] That concludes the proceedings of the Committee.

OPINIONS

EARLDOM OF ANNANDALE AND HARTFELL

Lord Scarman

My Lords,

I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Keith of Kinkel. I agree with it, and with the proposal that the Committee should report in its opinion the petitioner is entitled to succeed to the title and dignity of the Earl of Annandale and Hartfell in the peerage of Scotland.

Lord Keith of Kinkel

My Lords,

The petition with which your Lordships are concerned was presented to Her Majesty by Patrick Andrew Wentworth Hope Johnstone of Annandale and that ilk, praying that Her Majesty might admit his succession to, and declare him entitled to the title, style and dignity of Earl of Annandale and Hartfell in the peerage of Scotland. Following a report by the Lord Advocate expressing the opinion that the petitioner had made out a *prima facie* case to the Earldom, Her Majesty referred the petition to the House of Lords and the House has referred it to this Committee.

The petitioner is a descendant, partly, through females, of James, first Earl of Annandale and second Earl of Hartfell, whom I shall hereinafter call "the first Earl." I shall have occasion to consider the petitioner's detailed pedigree at a later stage. The First Earl's father was by King Charles the First created Lord Johnstone of Lochwood in 1633 and Earl of Hartfell by Letters Patent dated 18th March 1643, the destination of the latter being to the grantee "and his heirs male." The First Earl was created Earl of Annandale by Letters Patent of King Charles the Second dated 13th February 1661, with precedence according to the date of the Letters Patent creating his father Earl of Hartfell. These proceeded upon the narrative *inter alia* that the deceased James Earl of Anandale had died without heirs male of his body so that a patent of the title and dignity of the same (granted in 1624) had come to the King's hands, and that no-one was so worthy as the First Earl to enjoy that title. The Letters accordingly bore to create as Earls of Annandale and Hartfell, Viscounts of Annand and Lords of Johnstone and Lochwood, Lochmaben and Evandale the First Earl "and his heirs male whom failing the eldest born heir female without division of [his] body. . . . so far begotten or to be begotten and the heirs male of the body of the said eldest born heirs female legitimately begotten . . . and all which failing the nearest heirs whatsoever of the said" First Earl.

The First Earl died in 1672 and was succeeded by his son William, who was created Marquis of Annandale in 1701. He died in 1721 and was succeeded by his son James, who died in 1730 and was in turn succeeded by his half brother George, the Third and last Marquis of Annandale. Upon his death in 1792 the heirs male of the body of the First Earl became extinct. A claim to the title was thereupon advanced by James Third Earl of Hopetoun who was the grandson of the eldest daughter of William First Marquis of Annandale. This claim was referred to the Committee for Privileges, but no procedure seems to have followed. Following the death in 1816 of this claimant, a claim was presented by his daughter Lady Anne Hope Johnstone. She died in 1818 and the claim was taken up by her son John James Hope Johnstone. The Committee for Privileges gave consideration to his claim over a period of many years and finally, on 11th June 1844, resolved that it had not been made out, the resolution being confirmed by this House on 25th June 1844. John James Hope Johnstone made further efforts to establish his right, founding on

fresh evidence, but he died before any decision had been arrived at and the matter was taken up by his grandson, who bore the same name. On 30th May 1879 the Committee for Privileges expressed the opinion that no reason had been shown for departing from the resolution of 25th June 1844, and so resolved.

The claims which I have described were all founded upon the Letters Patent of 1661. They depended for their success upon establishing that, upon a true construction, the words " heirs male " in the destination of the peerage thereby created meant heirs male of the body of the First Earl, not his heirs male general, with the consequence that upon the extinction of heirs male of the body the succession opened to the eldest heir female of his body and the heirs male of the body of such eldest heir female. The Committee for Privileges rejected that as being the true construction in 1844 and again in 1879.

The present claimant does not found upon the Letters Patent of 1661. He relies instead upon a Signature under the sign manual of King Charles the Second dated 23rd April 1662 and a Charter under the Great Seal of Scotland following thereon and bearing the same date. His contention is that this Charter brought about a new creation in favour of the first Earl of the Earldom of Annandale and Hartfell, separate from and independent of the creation brought about by the Letters Patent of 1661. The Charter is a Charter of Novodamus. It details a great many lands, some of which were held by the First Earl directly of the Crown and others of which he had acquired by purchase, and recites that these have been resigned for new infeftment. It then proceeds of new to grant all these lands to the First Earl and heirs male lawfully begotten or to be begotten of his body, whom failing to his heirs female without division already procreated or to be procreated of his body, and the heirs male lawfully to be procreated of the body of the said eldest heir female carrying the name and arms of Johnstone . . . whom all failing the nearest heirs and assignees whomsoever of the First Earl. The Charter is in Latin, and the description of the destination which I have expressed is an English translation closely following the language of the Signature, which is a draft in English of the Charter and constitutes the royal authority for the issue of it. Having made this new grant of the specified lands the Charter goes on to unite and erect these lands into a territorial earldom (comitatum) in favour of the First Earl and his heirs and assignees foresaid " nucupatum et omni futuro tempore nuncupandum comitatum de Annandaill et Hartfell et dominium de Johnston cum titulo stylo et dignitate comitis secundum datas dipolmatum dicto consangineo et consiliario nostro Jacobo comiti de Annandaill et Hartfell et quondam ejus patri desuper concessorum " (called and to be called in a time coming the Eardom of Annandale and Hartfell and Lordship of Johnstone with the title style and dignity of an Earl according to the dates of the patents of the said James Earl of Annandale and Hartfell and his said deceased father granted to them thereupon). It is to be observed that whereas in the Charter there appears in relation to the earlier Patents the plural " datas " the Signature has the singular " date ". The Letters Patent of 1661 backdated the precedence of the Earldom of Annandale to the creation of the Earldom of Hartfell by the Letters Patent of 1643, so the singular would appear more appropriate.

The petitioner has produced a pedigree indicating that he is the heir called under the second branch of the destination contained in the Charter, that in favour of heirs female of the body and the heirs male of the body of the eldest heir female, and also indicating that the heirs male of the body of the First Earl are extinct. The Lord Lyon King of Arms, upon petition by the claimant, examined the evidence in support of this pedigree and issued an interlocutor dated 8th February 1984, finding it satisfactorily proved that the heirs male of the body of the First Earl were extinct and also that the claimant was heir male of the body of Lady Anne Hope Johnstone (mentioned above), who was herself heir female of the body of the First Earl following the death of her father James Third Earl of Hopetoun. The interlocutor also ordered the recording of the pedigree in the Public Register of all Genealogies and Birthbrieves in Scotland, and this has been done. It is to be noted also that in 1834 Lord Brougham, in a preliminary opinion given in the Committee for

Privileges, expressed himself as satisfied that the then claimant John James Hope Johnstone, great great great grandfather of the present claimant, had proved his pedigree. In the circumstances, I consider that the petitioner's pedigree and status as heir male of the body of the eldest heir female of the body of the First Earl, and also of the fact of extinction of heirs male of the First Earl's body, may be accepted without the requirement of formal proof, as suggested by the Lord Advocate in his Report to Her Majesty. It may be mentioned at this stage that there are before the Committee a number of letters, addressed to the Principal Clerk, from persons claiming to have some interest in the Earldom of Annandale and Hartfell, and commenting on the petitioner's claim. The interest of most of these persons would appear to be as possible heirs male general of the First Earl by descent from one of his ancestors. Heirs male general could not succeed under the destination in the 1662 Charter unless and until heirs female of the body became extinct, and accordingly could have no present interest. In one of the letters there is a suggestion of succession through descent from Major General John Johnstone, younger son of the First Earl. The Lord Lyon was satisfied, however, on sufficient evidence which is also before your Lordships, that Major General John Johnstone died in 1714 survived by no issue other than a daughter who died in infancy. It follows that no more detailed consideration need be given to these letters.

So the crucial issue comes to be whether the Charter of 1662 made a new creation of an Earldom of Annandale and Hartfell. The petitioner does not contend that the Earldom created by the Letters Patent of 1661, following a resignation, was granted anew by the 1662 Charter. Although some evidence was adduced suggesting that a lawyer acting for the First Earl had prepared an instrument of resignation of the Earldom in the hands of the Lords of Exchequer and had indeed recorded and obtained an extract of the instrument, no trace of such an instrument has been found in the official records of the time, though it has to be observed that a considerable number of these records were destroyed in a fire at Edinburgh in 1811. Further, contrary to what would be expected if such an instrument had in fact been recorded, no mention of a resignation of the Earldom appears in the 1662 Charter itself. It is also suggested that the words of re-grant "de novo dedimus" govern only the described lands. The Charter then embarks upon a new clause, introduced by "et similiter", which contains the erection of the lands into a territorial earldom "cum titulo stylo et dignitate comitis."

The first matter to be considered in resolving this crucial issue is whether or not any precedent exists for the royal creation of a second title of nobility in the same name as that of an earlier creation. This question must be answered affirmatively. In the case of the Lordship of Balfour of Burleigh (H.L.R.O. Peerage Records 21st July 1868 ; Vol 1, p. 27) Lord Chelmsford, presiding in the Committee for Privileges, said: "there can be no objection to two persons having the same title of nobility, of which many instances might be adduced." The best known example is perhaps that of the Earldoms of Mar. In 1875 the Committee for Privileges held that the Earl of Kellie had made out his claim to an Earldom of Mar created by Mary, Queen of Scots in 1565, and descendible to heirs male. (*The Mar Peerage* (1875) L.R. 1 App. Cas. 1). The Earldom of Mar Restitution Act 1885 restored John Francis Erskine Goodeve Erskine to the ancient Earldom of Mar descendible to the lawful heirs on either side of Isabel Countess of Mar, who died in 1408. There are thus now two holders of a title of the same name recognised as eligible to sit in your Lordships' house. James Second Lord Hamilton was created Earl of Arran by Charter dated 11th August 1503, and James Third Marquis of Hamilton was created *inter alia* Earl of Arran by Letters Patent dated 12th August 1643. (See The Complete Peerage, Vol. I, p. 224). A number of other similar instances are cited in the petitioner's Case. An instance of the same title of nobility being granted twice to the same individual, the destination being different in such case, is that of the Dukedom of Fife, which was by Queen Victoria granted to the First Duke by Letters Patent in 1889 and again in 1899. The first creation became extinct upon his death through failure of heirs male of the body. But the second descended to his eldest daughter, whose mother was the Princess Royal.

It is to be concluded that it is within the legal competence of the sovereign to grant the same title of nobility to more than one person concurrently, or to grant a title of nobility to an individual on more than one occasion without there having been any resignation of the prior grant, and that the subsequent grant may be on a different destination from the earlier one.

The next matter for consideration is whether or not the Signature and Charter of 1662, upon their true construction, demonstrate the royal intention of making a new grant of the title and dignity of Earl of Annandale and Hartfell. It is to be recognised, in the first place, that the conveyancing procedure followed was, in accordance with the practice of the time, apposite for the grant of a title of nobility. The Signature was superscribed by the royal sign manual and there was appended to it a docquet signed by the Secretary of State, the Earl of Lauderdale, summarising its effect and mentioning in particular that the lands specified in the Signature were to be united in a free barony, lordship and earldom to be called the Earldom of Annandale and Hartfell with the dignity of an Earl having the precedence of the earlier patents in favour of the First Earl and his deceased father. The Charter itself followed the terms of the Signature and duly passed the Great Seal of Scotland. There can be no doubt whatever that if there had been no earlier creation of the peerage dignities of Earl of Annandale and Earl of Hartfell this Charter would have been completely effective to make a first creation of Earl of Annandale and Hartfell. Many Charters of the period contained a grant of lands, followed by the erection of these lands into a territorial barony or earldom under a particular name, followed by the grant of a title of nobility of that name. In a number of Charters of King James the Sixth and First which follow this pattern the grant of the title of nobility is accomplished by the word "concedendo" (there being granted) followed by the accusative "titulum et honorem", and other forms of words are also used on occasion. There are, however, precedents of earlier and later date where, following a grant of lands later expressed as being erected into a territorial lordship, mention of title and dignity is introduced by the preposition "cum". In the *Mar Peerage* case (*supra*) at p. 26 Lord Redesdale mentions that in a Charter of Robert I granting to his brother, Edward Bruce "totum comitatum de Carrick" he is made an earl by the words "cum nomine jure et dignitate comitis." A Charter of 1615 bore to grant to Sir James Stewart of Killeith and his heirs male "terras dominium et baroniam de uchiltrie unitas in unum dominium et baroniam cum omnibus honoribus et titulis." The lands and title had been resigned by the previous Lord Ochiltree, and the royal intention that Sir James should enjoy the title of nobility was clearly signified by a letter to the Privy Council dated 27th May 1615.

A consideration of the general conveyancing practice of those times indicates that the preposition "cum", though it commonly introduces no more than a reference to subjects which are merely pertinents of the principal object of a grant, is quite regularly used to add to what is earlier granted further heritable subjects of considerable importance. A common example is salmon fishing.

I conclude that in the present case the circumstance that mention of the title and dignity of an earl is introduced by "cum" and that the title and dignity is not directly made the object of words connoting a grant is not inconsistent with the intention to create a peerage dignity. Read literally, the words used are capable of bearing that interpretation: "we have created (creavimus) a territorial earldom (comitatum) with the title, style and dignity of an earl." The petitioner adduced evidence of a considerable number of instances of the creation of a territorial lordship without any reference to a peerage dignity. It is a general rule of construction that particular words in a written instrument are presumed to have been introduced for some purpose and are intended to have some practical effect. If the words under consideration in the present Charter are not intended to have the effect of conferring a title of nobility it is difficult to see what purpose they serve. It might be suggested that they do no more than recognise the existence of the peerage Earldom previously granted as running with the territorial Earldom which the Charter clearly creates. But the destination of that peerage Earldom was different from that attached by the Charter to the territorial earldom, so plainly

the two might diverge in circumstances which were quite likely to happen. It is also of considerable significance that the title and dignity are mentioned in the docquet appended to the Signature. If the mention of a title and dignity were intended to have no operative effect, it might not be expected to be referred to in the docquet, which is quite a short document designed to bring to the notice of the King all the material features of the Signature, which it is very likely that he would not read in full. The reference to the date of precedence of the title and dignity of earl is also important. The date of precedence of the pre-existing title and dignity were fixed and known. If no new title and dignity were being created there would be no need whatever to refer to the date of precedence of original creation. If, on the other hand, the intention was to make a new creation, the reference to the precedence serves a definite and obvious purpose, namely to bring about that the new creation was to be back-dated so as to give it an earlier precedence than it would otherwise have had. It is to be observed that the matter of precedence finds mention in the docquet.

The strongest argument against the petitioner's case is perhaps that it is an unlikely and unreasonable intention to attribute to the King that, having created the First Earl Earl of Annandale in 1661, he should create him again Earl of Hartfell and Annandale in 1662. It may be said that if there were special reasons which led him to form this inherently improbable intention it would reasonably be expected that they would be set out in a narrative to the Charter. But narratives of the nature that are familiar in modern instruments are not a feature of Charters of that period, which tended to be very much formalised. The family circumstances of the First Earl are well authenticated. He was married, probably about 1650, to Henrietta, daughter of William, Marquess of Douglas. In 1660 he had two surviving daughters, born respectively in 1652 and 1654. Three other daughters had died in infancy. His only brother, Lt. Col. William Johnstone of Blacklaws, had died without issue in 1657. A number of collateral lines had died out without male issue by 1656, so that his nearest heirs male general were fourth cousins. In the circumstances it is natural that he should have been very concerned about the succession to his lands and also to his title of Earl of Hartfell. It is known that in 1657 he executed an instrument of resignation of his lands and also of his title in the hands of the Commissioners of the Exchequer, for new infeftment in favour of the heirs male of his body, whom failing the heirs female of his body therein specified, whom failing upon certain other destinations. This was during the Protectorate and nothing followed upon the instrument. A son was born to the First Earl on 17th December 1660, and baptised on 23rd December 1661. He too died in infancy, certainly before the beginning of 1664 and most probably not long after his baptism. He may have been still living on 13th February 1661, the date of the Letters Patent creating the First Earl Earl of Annandale, but if so it is highly probable, having regard to the incidence of infant mortality at that time, and the First Earl would have regarded as secure the succession through heirs male of his body. In the circumstances it is perhaps surprising that the initial destination of the Letters Patent of 1661 was to his heirs male general, but one can only speculate as to how this may have come about. At this time the administrative state of affairs in Scotland, and no doubt in England also, was in considerable confusion, and many important officials were yet to be appointed. King Charles the Second has been proclaimed King on 5th May 1660, but did not arrive in London until 29th May 1660. There was no keeper of the Great Seal of Scotland until 19th January 1661, no Privy Council until 13th February 1661, and no Commissioners of Exchequer until the beginning of March. Plainly the First Earl continued to be concerned that, failing heirs male of his body, his lands should pass to heirs female of his body, and this was secured by the Charter of 23rd April 1662, which was probably as soon as could reasonably be expected after the necessary administrative machinery had been put in place. It would be surprising if the First Earl were not equally concerned about the succession to his title and dignity, and the question is whether or not the 1662 Charter evidences that he secured the King's consent to the creation of a new earldom following the same line of descent as the territorial earldom thereby plainly created. There is no inherent improbability about the prospects of his having

been able to do so, having regard to the many tributes paid by the King to his father's and his own loyalty and valuable services during the Civil War and the Protectorate, and the finding by the Scottish Parliament on 15th June 1661 that by reason of that loyalty and those services his father had suffered losses in excess of £24,000 English, to say nothing of having narrowly escaped execution and been confined for some years in the castles of Edinburgh, Glasgow, Dumbarton and St. Andrews. Having regard to the aftermath of the preceding troubled years and the lack of precision seen from time to time as regards the grant of a new title and dignity in the same name as an existing one, without insisting on any resignation of the old one with a view to regrant, it is not possible to regard a new creation in the old names as surprising. This is particularly so when careful consideration is given to the earlier history of the titles and dignities of this family. As has been noted above, the creation of Earl of Hartfell, in 1643, was in favour of the First Earl's father and his heirs male. The Letters Patent of 1661 did not follow upon any resignation of the Earldom of Hartfell. They proceeded on the narrative that the Earldom of Annandale (which is known to have been originally created in 1624) had become extinct, so as to be at the King's disposition. In so far as the Letters Patent bore to create the First Earl Earl of Hartfell as well as Earl of Annandale they were conferring upon him a new earldom which had not been resigned. Furthermore, the earldom of Hartfell thereby conferred was upon a different destination from the original one, in respect that the eldest born heir female and the heirs male of her body were called to the succession failing heirs male of the grantee. The extinction for practical purposes of heirs male general was recognised as a possibility by the Committee for Privileges in the proceedings of 1844 concerned with the 1661 peerage. Lord Lyndhurst said (Speeches 11th June 1844, p. 14);

> "In the first place it is not true practically, and in the view of a Court of Law, their heirs male general can never become extinct. The existence of an heir is a matter of proof—a matter of evidence. Heirs male general have in many cases become extinct, even in great families, in the progress of time. All trace of them has been lost, and if, after diligent and cautious enquiry no heir male can be found, and there is sufficient ground to believe that no such heir can be discovered, this will let in the next limitation."

The Committee then took the view that the Letters Patent of 1661 did not create a new Earldom of Hartfell. In conformity with his view, the Lord Chancellor (Earl Cairns) said in the course of the 1879 proceedings (Speeches 30th May 1879, p. 3) that the Patent of 1661 created an entirely new and apparently larger and more important honour—the title of Annandale. This is consistent with the fact that it was only the Earldom of Annandale which the King had at his disposition at the time. So at that time the title of Hartfell was held upon one destination, that in the 1643 Patent, and the title of Annandale upon another and different destination. The possibility existed that the titles might diverge. Upon extinction of heirs male general the title of Hartfell would become extinct with them, but the succession to the title of Annandale would open to heirs female of the body of the grantee. The title of Earl of Annandale and Hartfell is something new. It is the title neither of Hartfell nor of Annandale but of both. The territorial earldom of Annandale and Hartfell created by the Charter of 1662 was also something new. I have come to be of the clear opinion, after some initial doubts, that the King by the Charter of 1662 intended to and did create, not only the territorial earldom of Annandale and Hartfell, but also the new title, style and dignity of Earl of Annandale and Hartfell to go with it upon the same destination. It follows that just as the title of Annandale might have followed a different destination from that of Hartfell so might that of Annandale and Hartfell have followed a different destination from one at least of the others. I do not regard the circumstance that all three titles have the same precedence as creating any difficulty in the way of that view. The title of Hartfell and that of Annandale have the same precedence yet might diverge. It makes matters little worse that there is a third title of Annandale and Hartfell, of which the same is true. In the unlikely event of a conflict of precedence arising I have no doubt that a method of resolving

it would be found, probably on the basis that the earlier creation, albeit deemed to be of the same date as the later, would have preference.

The final matter for consideration is whether or not the findings of the Committee for Privileges, adopted by the House, in the proceedings concluded in 1844 and in 1879 constitute a bar to the petitioner's claim. It is important to note that the claims then presented by the petitioner's ancestors, John James Hope Johnstone and his grandson of the same name, were founded exclusively on the Letters Patent of 1661. Although the Signature and Charter of 1662 were laid before the Committee (see minutes 14th May 1844), no attempt was made to rely upon these as having created a title and dignity separate and distinct from that created by the 1661 Patent, as the petitioner now does. The only use sought to be made of them was an aid to the construction of the destination in the 1661 Patent, and they were not mentioned in any of the speeches delivered by members of the Committee. In the circumstances the question now at issue was not then considered or decided by the Committee. Indeed, the subject matter of the 19th Century proceedings is properly to be treated as different from that of the present claim. It is, in any event, well settled in the law of Scotland that heritable rights and rights of blood do not prescribe unless there has been adverse possession. The correct view, in my opinion, is that all that was decided in 1844 and again in 1879 was a point of construction on the destination contained in the 1661 Patent. I am accordingly of the opinion that these earlier decisions are not a bar to the petitioner's claim.

My Lords, the conclusion I have reached is that the petitioner has made out his claim. I would suggest that your Lordships report to the House that the opinion of the Committee is that the Signature and Charter of 1662 created a title and dignity of Earl of Annandale and Hartfell separate and distinct from the titles and dignities of Earl of Hartfell and Earl of Annandale created respectively by the Patent of 1643 and the Patent of 1661 ; that the petitioner is the heir male of the body of Lady Anne Hope Johnstone, who was the eldest heir female to the body of the First Earl and that, as such, he is the person now entitled to succeed to the title and dignity of the Earl of Annandale and Hartfell in the peerage of Scotland, created by the Signature and Charter of 1662.

Lord Brightman

My Lords,

For the reasons given by my noble and learned friend Lord Keith of Kinkel, I too have reached the conclusion that the Petitioner has made out his claim, and would propose that your Lordships should report to the House accordingly.

Lord Templeman

My Lords,

I defer to the views expressed by my noble and learned friend, Lord Keith of Kinkel.

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